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IN THE

Supreme Court of the United States

October Term, 1970

No. ———

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

AUBURNDALE FREEZER CORPORATION, MINUTE MAID COMPANY, AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 28, 1970.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, 177 NLRB No. 108, 71 LRRM 1503, is reproduced in the Appendix to this petition at *App.* 17-39.[1] The opinion of the Court of Appeals is reported at —F.2d —, 75 LRRM 2752, and is reproduced in the Appendix to this petition at *App.* 1-16.

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[1] The Appendix to this petition is separately paginated, and is referred to herein as "*App.*"

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1970. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).[2]

QUESTION PRESENTED

A manufacturer stores his goods in an independent warehouse until they can be sold. A union engaged in a primary dispute with the manufacturer pickets the truck and rail entrances to the warehouse, urging common carrier employees not to pick up the primary employer's goods. Is that picketing "primary" (as the board held) or a secondary boycott violative of Section 8(b)(4) of the LMRA (as the court below held)?

STATEMENT OF THE CASE

Cypress Garden Citrus Products, Inc. (hereinafter "Cypress") is engaged in the business of processing citrus fruits and products, including citrus concentrate, at a plant in Eloise, Florida (*App.* 2, 18-19). Because citrus harvesting is seasonal, Cypress produces its citrus concentrate mostly during the months of March through July, places the concentrate in cold storage, and sells it on a year-round basis as orders are received. (*App.* 9, 19; A. 80).[3]

Cypress maintains a cold storage warehouse on its own premises, but this warehouse cannot hold all the concentrate it produces (A. 94). Accordingly, Cypress also stores concentrate in a warehouse owned by respondent Auburndale Freezer Corporation (hereinafter "Auburndale"), located five or six miles from the Cypress plant (*App.* 2-3). During the "peak" growing season—March through July—

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[2] The instant petition is being filed on the 91st day, but is timely because the 90th day was a Sunday. *Union National Bank* v. *Lamb*, 337 U.S. 38, 40-41 (1949).

[3] As used herein, "A" refers to the Appendix in the court below.

Cypress' trucks, driven by Cypress' employees, "continuously" deliver cases and drums of concentrate to the Auburndale waerhouse (*App.* 19).[4] Employees of respondent Minute Maid Company, who perform all the labor at the Auburndale warehouse, unload the Cypress trucks, store the concentrate in the warehouse, and give a receipt to the Cypress driver who then returns to the plant (*App.* 19).

During the remainder of the year, as Cypress receives orders for concentrate, it arranges with common carriers (truck and rail) to pick up the concentrate at the Auburndale warehouse and deliver it to the customer. Pursuant to shipping instructions which Cypress gives to Auburndale, Minute Maid employees load the common carriers' trucks and/or rail cars when they arrive at the warehouse to pick up the concentrate (*App.* 9-10, 19; A. 80).

Occasionally, Cypress wishes to have drums of concentrate returned to its plant from the Auburndale warehouse for repackaging into cases (See n. 4, *supra*). In those instances, Cypress' trucks, driven by Cypress' employees, come to the Auburndale warehouse, and Minute Maid employees load the drums of concentrate onto the trucks (*App.* 9; A. 78).

Cypress has been storing its concentrate at the Auburndale warehouse since the latter was opened in 1956 (*App.* 8, 21; A. 87-88). At the critical period involved in this case, Cypress and Auburndale were parties to a five-year contract (negotiated in January, 1967), under which Auburndale guaranteed storage space for up to 300,000 cases of Cypress concentrate (approximately 10% of the total space in the Auburndale warehouse), and Cypress agreed

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[4] "Cases" of concentrate are ready for market, and weigh approximately 22½ pounds (A. 90, 99). "Drums" of concentrate contain 55 gallons, and must be repackaged into cases before marketing (A. 90-91). Some of the drums are sold to customers who do the repackaging themselves; others are returned from the Auburndale warehouse to the Cypress plant so that Cypress can repackage them for sale (A. 90-91).

to pay a minimum annual rental of $25,000 per year, and a maximum of $45,000 per year (depending upon the number of cases actually stored), plus a servicing charge (*App.* 9; A. 108-110).[5]

Petitioner (hereinafter "the Union") is the collective bargaining representative of Cypress' employees. On October 15, 1967, as a result of a breakdown in contract negotiations, the Union called a strike of Cypress' employees (*App.* 3). At the time the strike began, Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse (*App.* 20, 21). On October 17, 1967, the Union posted pickets at the truck and railroad entrances to the Auburndale warehouse, carrying signs which read:

> "Employees of Cypress Garden Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO." (*App.* 3).

The Board found (*App.* 22-23) that the sole purposes of the Union's picketing at the Auburndale warehouse were (1) to induce employees of common carriers not to pick up Cypress concentrate stored there, and (2) if Cypress sent its trucks to the warehouse to pick up concentrate for return to the Cypress plant, to induce the drivers not to pick up the concentrate. There was no evidence that the operations of any other firm which stored goods in the warehouse were interrupted or interferred with in any way (*App.* 10).

Auburndale and Minute Maid filed charges with the Board alleging that the picketing at the Auburndale warehouse was a secondary boycott violative of Section 8(b)(4) of the Labor Management Relations Act of 1947, 29 U.S.C. § 158(b)(4).[6] The Board, by a vote of 3-2, concluded that

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[5] A case of concentrate weighs 22½ pounds (A. 99). Thus the contract guaranteed Cypress the right to store up to 6,750,000 pounds of concentrate in the Auburndale warehouse at all times.

[6] The relevant portion of Section 8(b)(4) is quoted *infra*, at *App.* 1, n. 1.

the picketing was "primary," and therefore lawful. The majority noted that (*App.* 22):

> "the concentrate, while stored at the Auburndale warehouse is, for all practical purposes, under the control of Cypress, . . . the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, . . . there is substantial contact between Cypress, its employees, and the Auburndale warehouse, and . . . the storage of concentrate at the warehouse, which practice has been continuous since 1956, constitutes an integral part of the Cypress production process."

Further noting that the picketing was by its terms "directed solely to the primary employer, Cypress" (*App.* 22), the majority concluded that appeals "to such common carrier employees as might approach the warehouse to pick up Cypress' products, . . . would, under the circumstances, constitute legitimate primary action" (*App.* 23). In support of this conclusion, the majority cited this Court's decisions in *Local 761, International Union of Electrical Workers* v. *NLRB* [*General Electric*], 366 U.S. 667 (1961), and *United Steelworkers of America* v. *NLRB* [*Carrier Corp.*], 376 U.S. 492 (1964).

The dissenting Board members argued that the picketing could not be primary because no employees of Cypress worked at the Auburndale warehouse (*App.* 26-27). The dissenters did not cite, let alone attempt to distinguish, this Court's decisions in *General Electric* and *Carrier.*

Auburndale and Minute Maid petitioned for review of the Board's decision, and the court below, by a vote of 2-1, concluded that the picketing was "secondary" and therefore unlawful. The majority (Judges Coleman and Jones), recognized this case to be "of supreme public importance" (*App.* 5). Without citing a single 8(b)(4) decision, the majority declared that "The picketing was prohibited by

the plain terms of the statute" (*App.* 7).[7] The majority reasoned that since no Cypress employees worked at the Auburndale warehouse, picketing there could not be primary (*App.* 6). As frosting on the cake, the majority discerned—with no evidentiary support in the record—that the "real object" of the picketing was to shut down all operations at the Auburndale warehouse:

> "We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten percent. Inescapably, the purpose was to halt the operations of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy" (*App.* 7).

Judge Wisdom dissented. In his view, the Board's conclusion that the picketing was "primary" was a correct application of this Court's decisions in *General Electric* and *Carrier*. He reasoned that storage at the Auburndale warehouse was an integral part of Cypress' production process, that the Union's picketing was for the purpose of disrupting that process (by inducing employees of common carriers not to pick up Cypress' concentrate), and that such picketing is "primary" under this Court's decisions (*App.* 11, 15):

> "It is a fair statement that the storage of concentrate in the warehouse subject to disposition by Cypress constituted the final step in the Cypress production process.

* * * * * *

---

[7] Thus the majority's literal approach is proof of what this Court said in *General Electric*, 366 U.S. at 672: "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary picketing."

"[T]he Board properly found that Cypress was engaged in its normal business operations at the warehouse during the picketing, and that the Union picketed the warehouse for the primary object of disrupting those operations.

"Here where the primary employer's operation is carried on not only at his own plant but also at a neutral employer's premises, the union must be permitted to appeal to those employees at the latter site who are performing work intimately connected with the struck employer's normal business operations. See, e.g., *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *NLRB,* 1964, 376 U.S. 492, 499-500, in which the Supreme Court held that the union could permissibly appeal to employees of a neutral common carrier on the carrier's own premises because it was furnishing day-to-day service essential to the primary employer's regular operations. See also, *International Brotherhood of Electrical Workers, Local 480* v. *NLRB (Gulf Coast Bldg. & Supply Co.),* D.C. Cir. 1969, 413 F.2d 1085, 1090, n. 7.

" 'The essential factor which renders the analysis in General Electric and Carrier applicable to Auburndale . . . is the integral relationship of the particular facility picketed to the operations of the struck employer . . . *Samoff* v. *Oil, Chemical & Atomic Workers, Local 8-732,* D.C. Del. 1969, 307 F. Supp. 434, 439.' " (Footnotes omitted.)

REASONS FOR GRANTING THE WRIT

I

As the Court below recognized, "This case is of supreme public importance" (*App.* 5). One of the major factors determining the success of every strike is whether the employer is able to ship to customers the goods which were produced prior to the outbreak of the strike. It is well

established that a striking union may seek to induce employees of common carriers not to pick up those goods from the primary employer's plant. *Local 761, International Union of Electrical Workers* v. *NLRB* [*General Electric Co.*], 366 U.S. 667, 680-681 (1961); *United Steelworkers* v. *NLRB* [*Carrier Corp.*], 376 U.S. 492, 499 (1964); *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 389 (1969). The instant case poses a closely related issue: if the primary employer has rented space for storage of some of his goods in an independent warehouse, does the striking union lose its right to appeal to employees of common carriers not to pick up those good?

The Board concluded that the principles enunciated by this Court in *General Electric* and *Carrier* are equally applicable whether the primary employer's goods are stored at his own plant or in an independent warehouse. Judge Wisdom, dissenting below, agreed with the Board. The majority opinion in the court below did not really come to grips with this issue, for it proceeded on the premise that all picketing directed solely to neutral employees is unlawful, a premise which has been expressly rejected by this Court three times. *General Electric*, 366 U.S. at 680-681; *Carrier*, 376 U.S. at 497-499; *Jacksonville Terminal*, 394 U.S. at 389.

We believe, with Judge Wisdom, that the Board's conclusion necessarily follows from *General Electric* and *Carrier*, and we will briefly demonstrate below why that is so. But even if the issue were more doubtful than we think it is, the recurring nature of the problem dictates its prompt resolution by this Court. In the court below, briefs *amicus curiae* were filed by The American Warehousemen's Association and the National Association of Refrigerated Warehouses, Inc., each emphasizing that the issue posed by the instant case is one of widespread importance. The former, for example, pointed out that more than $50,000,000,000 of the United States annual gross national product is

handled through warehouses (Brief for American Warehousemen's Association, p. 2), and that the majority of warehouse customers have goods stored "continuously" (*Id.*, p. 3).[8]

II

The decision below conflicts with principles enunciated by this Court in *General Electric* and *Carrier*. In those cases, this Court held that "primary picketing" encompasses not only appeals to primary employees to withhold their services from their employer, but also appeals to secondary employees not to perform duties "connected with the normal operations of the [struck] employer." *Carrier*, 376 U.S. at 497. See also *General Electric*, 366 U.S. at 680-681; *Jacksonville Terminal*, 394 U.S. at 389. The employees of common carriers (truck and railroad), whose duty is to pick up the primary employer's goods and transmit them into the stream of commerce, are within the ambit of those to whom the striking union may address its appeal. *Ibid.*

In *General Electric* and *Carrier* the goods were stored on the primary employer's premises. But the economic realities are wholly unchanged when, as here, some of the employer's goods are stored in an independent warehouse. The employer's interest in transmitting his goods into the stream of commerce is identical, and the union's interest in preventing that occurrence, i.e. in "halting the day-to-day operations of the struck employer" (*Carrier*, 376 U.S. at 499), likewise is identical. The Board concluded—and Judge Wisdom agreed—that the storage of the concentrate at Auburndale's warehouse was as integral a part of Cypress' operations as if stored on Cypress' own premises. In practical

[8] The identical issue was posed, subsequent to the Board's decision in the instant case, in *Samoff* v. *Oil, Chemical & Atomic Workers*, 307 F. Supp. 434 (D. Del. 1969). The Court concluded that in light of *General Electric* and *Carrier* the striking union was entitled to picket at a neutral warehouse asking employees of common carriers not to pick up the primary employer's goods.

effect, the leased space in the warehouse was an extension of Cypress' plant.

To be sure, the Auburndale warehouse also stored the goods of other manufacturers. But that did not warrant precluding all picketing by the Union; rather, it imposed an obligation upon the Union to make clear that its dispute was limited to Cypress. The Union did precisely that, and there is no evidence that pickups and deliveries of the other manufacturers' goods were interrupted in any way. Thus the situation here was no different from *Carrier,* where the railroad gate—located on the neutral employer's property—served several manufacturers in addition to the struck employer. "The railroad employees were not encouraged to, nor did they, refuse to serve the other plants." *Carrier,* 376 U.S. at 499. As this Court later explained in *Jacksonville Terminal,* 394 U.S. at 389, the holding in *Carrier* was that:

> "striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck." [9]

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[9] *See also NLRB* v. *Fruit & Vegetables Packers* [*Tree Fruits*], 377 U.S. 58 (1964), holding that unions may engage in consumer picketing at retail stores, provided their appeal is limited to the products of the struck employer.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS

No. 28522

AUBURNDALE FREEZER CORPORATION AND MINUTE MAID COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AND

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Intervenor.

Before JONES, WISDOM, and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge:—The issue for decision is whether a labor union by picketing the premises of neutral employers committed a secondary boycott in violation § 8 (b) (4) (i) and (ii) (B) of the National Labor Relations Act, as amended.[1]

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[1] 29 U.S.C.A. § 158(b) (4) (i) and (ii) (B).

Section 8(b) (4) of the amended Act makes it an unfair labor practice for a union

(i) to engage in, or to induce or encourage any individual * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or

(ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

The Hearing Examiner found in the affirmative and recommended the issuance of a cease and desist order. The National Labor Relations Board, by a vote of 3 to 2, held to the contrary, dismissing the consolidated complaints.[2]

We grant the petition for review, vacate the Order of the Board, and remand for the entry of the recommended cease and desist order.

The neutral employers were Auburndale Freezer Corporation and Minute Maid, another corporation.

Auburndale is the sole owner of a public cold storage warehouse at Auburndale, Florida. It has only three employees, a general manager, an office secretary, and a maintenance man.

By contract with Minute Maid, the work of unloading deliveries to the warehouse, furnishing bills of lading, placing contents in storage, and servicing outgoing shipments on freight cars and trucks (common carriers) is performed by thirty employees of Minute Maid. Those employees work under the direction of Minute Maid's superintendent, who takes his instructions from Auburndale's general manager.

Auburndale's freezer plant can store approximately three million cases of citrus concentrate at any one time. Auburndale has about *twenty* cold storage customers, such as Minute Maid, from its nearby citrus processing plant, General Foods, Florida Home Juice, Cypress, and others.

About five or six miles from Auburndale, at Eloise, Florida, Cypress Gardens Citrus Products, the primary employer in this dispute, operates a citrus processing plant, including some warehouse facilities. No employee of Cypress has ever worked at the Auburndale warehouse. Cypress had a contract with Auburndale which obligated the latter to furnish the former storage space for up to 300,000 cases of citrus

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[2] 177 NLRB No. 108, 71 LRRM 1503, June 30, 1969.

concentrate (approximately 10% of the Auburndale storage space) at a specified price. If Cypress wished to store any of its processed products at Auburndale its trucks, loaded with its product, driven by its employees, went to the warehouse facility. The Minute Maid employees unloaded the Cypress trucks by forklift and placed the product in storage. A receipt was given the Cypress driver, who then left the warehouse. Cypress is not allotted any particular portion of or space in the warehouse. Its goods, however, are placed in identifiable rows or stacks, as is the case with other customers of the warehouse. When Cypress sold the goods (not at retail) it issued Auburndale instructions to ship the product. The Minute Maid employees then load the goods, as per instructions, on either railroad cars or trucks.

The busiest period at Auburndale is from March until July, peaking in June, the height of the citrus season.

On October 15, 1967, after a breakdown in bargaining negotiations, Local 6991, United Steelworkers of America, AFL-CIO, struck Cypress. The Union had no dispute with either Auburndale or Minute Maid *or any other employer* which stored its products at the warehouse. Two days later, about fifteen striking Cypress employees began picketing the entrance at Auburndale, ordinarily used by Cypress drivers and the warehouse employees. Occasionally, the railroad siding where it enters the Auburndale plant was also picketed. The pickets carried signs which read as follows:

"Employees of Cypress Garden Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steel Workers of America, Local 6991, AFL-CIO."

After two weeks the pickets had diminished to two in number. The picketing was maintained at all times when the Minute Maid employees were working at the warehouse.

October was a very slack time in citrus operations. Cy-

press sent no trucks to Auburndale while it was being picketed. Neither did Auburndale ship any of the Cypress products via common carrier. Auburndale had nothing to do with product sales.

Auburndale and Minute Maid separately charged the Union with engaging in unfair labor practice. The General Counsel consolidated the cases and issued a complaint that the Union had engaged in picketing, etc., with the object of forcing and requiring Auburndale, Minute Maid, and others to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Cypress, contrary to the statute.

Pursuant to a hearing held in due course, the Trial Examiner concluded that the picketing

> "Induced and encouraged individuals employed by Auburndale *and other secondary employers* (emphasis ours) to cease performing services for their respective employers, and (2) coerced and restrained Auburndale, an object thereof being to force or require Auburndale to cease doing business with Cypress in violation of § 8(b)(4)(i) and (ii)(B) of the Act."

A majority of the Board [3–2] disagreed with the Trial Examiner. It held that Cypress' activities at Auburndale constituted an integral part of the Cypress *production process* (emphasis ours) and that the warehouse, "to the extent that [it] is a part of the Cypress operation" constituted a common situs. The majority further concluded that "the picketing conformed in all respects with Moore Dry Dock requirements for legitimate common situs picketing."

The Board based its decision on "sufficient presence" of the primary employer at the secondary site, that there was a direct and immediate relationship between the picketing and the object of the picketing sufficient to support a finding of purely primary picketing. It held that the concentrate

while stored at the warehouse was, for all practical purposes, under the control of Cypress, that common carriers there received Cypress goods for delivery to Cypress customers.

The dissenting Board Members pointed out that Auburndale was furnishing warehouse services on its own separate premises to various citrus processors, that Cypress employees performed no function at Auburndale other than the delivery of products by truck, that Cypress sent no trucks to Auburndale while picketing was in progress, that Cypress' presence at Auburndale was nothing more than the presence of the "primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage services to its customers, and that Cypress provided only a minor portion of the Auburndale business."

The dissenting Members further stated that the Board had never hitherto held that the mere presence of a primary employer's goods on the premises of a neutral employer, pursuant to an established business relationship, is sufficient in and of itself to convert the picketing of such neutral premises from unlawful secondary to lawful primary picketing.

These Board Members concluded that "the only possible thrust of Respondent's picketing appeal must have been directed to the neutral Auburndale, to the neutral employees engaged in warehousing tasks, *or to neutral employees of Auburndale's other customers* (emphasis ours). This is the classic example of the secondary boycott proscribed by the statute."

This case is of supreme public importance. The inescapable effect of the Board decision would be to inject a public warehouse operator and other employers who use his facilities into the labor disputes of all customers. A public ware-

house could be subject to picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse. The impact on the general welfare could be expecially critical in those instances where, as here, perishable food products intended for human consumption are substantially involved.

On the undisputed facts in this record we are of the opinion that this case may not properly be decided on strained or ephemeral extensions or constructions of *situs,* applied out of context. The subsidiary question of situs may not obliterate the major question: On the undisputed facts, did the picketing at Auburndale violate the statute?

The statute, 29 U.S.C.A., § 159(b)(4)(i) and (ii)(B) unmistakably makes it an unfair labor practice for a union to coerce or restrain any person with the object of forcing or requiring him to cease * * * handling * * * the products of any other producer or processor except by primary strikes or primary picketing [Fn. 1].

There was no strike against Auburndale or Minute Maid or against the nineteen other employers who stored their products at that warehouse.

The processing plant of Cypress, five miles from Auburndale, was, of course, struck and picketed. That is where the employees of Cypress processed the citrus. That was the real situs of both the dispute and the strike. That was the place for primary picketing. No Cypress employees were at work at Auburndale, and never had been.

The statute prescribes the reviewing role of this Court. We are first to determine if the Board findings are supported by substantial evidence, viewing the record as a whole. Then we are to determine whether the Board correctly applied the law, 29 U.S.C.A., § 160(e)(f). The basic evidentiary facts in this case are not in dispute.

On the undisputed facts it is "quite clear what the truth"

of this case is, see *N.L.R.B.* v. *Smith Industries,* 5 Cir., 1968, 403 F.2d 889, 893. There is no rational basis in this record upon which reasonable men might differ as to the facts.

We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten per cent. Inescapably, the purpose was to halt the operations of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy.

It necessarily follows that the finding of the majority of the Board that the picketing was entitled to primary classification is not supported by substantial evidence from the record as a whole and was legally erroneous.

The picketing was prohibited by the plain terms of the statute.

The Order of the Board dismissing the consolidated complaints is vacated and the case is remanded with directions to enter the cease and desist order recommended by the Trial Examiner.

VACATED and REMANDED, with Directions.

Dissenting Opinion

WISDOM, Circuit Judge, dissenting:—I respectfully dissent.

I. The line between legitimate primary and unlawful secondary activity is relatively easy to draw where the primary and secondary employers have separate work-sites. A more difficult problem is presented in the common situs

cases—"where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 1969, 394 U.S. 369, 388. As the Board observed, "[i]n determining whether or not the Auburndale warehouse is a common situs the question is whether or not there is sufficient 'presence of the primary' at the secondary site." The Board correctly noted that " 'presence of the primary' is a term of art and refers to a multitude of factors that are to be evaluated in light of the union's presumably permissible 'primary' objective of bringing about a complete cessation of the primary employer's operations." I would hold that the storage and processing of Cypress' concentrate at the Auburndale warehouse was an integral part of the Cypress production process, and the warehouse was a common situs for purposes of Section 8(b)(4)(B) of the Act. As I see it, therefore, the picketing at that situs was lawful primary activity under Section 8(b)(4)(i) and (ii)(B) of the Act.

II. Cypress, the primary employer, processes citrus fruits at its plant in Eloise, Florida. Since 1956 Cypress has been storing its products at Auburndale's cold storage warehouse, located five or six miles from the Cypress plant. This warehouse is staffed by three Auburndale employees—a manager, a secretary, and a maintenance man—and by 30 employees of Minute Maid who, under a contract, perform all the general warehousing services. No Cypress employees work at the warehouse. Auburndale is the sale owner of the warehouse and completely controls its operations.

Minute Maid is a Florida corporation also engaged in the business of processing citrus fruits and juices. Minute Maid owns and operates a plant in Auburndale near the warehouse. Under a lease arrangement, Minute Maid had for twelve years, a first option to lease 135,000 sq. feet of space

in the warehouse for the storage of its products or about fifty percent of the usable warehouse space. Minute Maid, by contract with Auburndale, provides the labor for the performance of all warehousing services at the warehouse. This includes the unloading and loading of trucks and railroad cars and the handling of all products in and out of storage, both with respect to Minute Maid and those of the other customers who utilize the storage space not allocated to Minute Maid. Minute Maid bills Auburndale directly and is paid by the latter for all the warehousing services provided. Auburndale in turn independently bills the other customers. Minute Maid has a superintendent who is responsible for supervising the thirty employees performing the warehouse services. In January 1967, Cypress and Auburndale executed a five-year contract under which Auburndale agreed to furnish Cypress space for up to 300,000 cases of citrus concentrate. This entails approximately 10 percent of the total storage space at the warehouse. Cypress agreed to pay a minimum annual rental of $25,000 for storage space.

In the regular course of business, Cypress trucks haul citrus concentrate to the warehouse, Minute Maid employees drive onto the truck, unload the product, and place it in storage. The Cypress driver does no work at the warehouse and leaves after he is given a receipt. During the peak season for processing citrus fruits, from March through July, Cypress trucks arrive at the warehouse "continuously". Cypress vehicles also come to the warehouse to "deliver orders or releases from the bank" and, on occasion, Cypress drivers pick up concentrate stored in drums at the warehouse and return it to the Cypress plant where it is placed in smaller containers and packed in cases. Generally, however, the storing of concentrate at the warehouse is the final step in the Cypress production process. Upon the sale

of its concentrate, Cypress gives Auburndale an order to ship the product. The product is then loaded by the Minute Maid employees onto the trucks or railroad freight cars of the designated common carrier.

On October 15, 1967, the contract negotiations which the Union and Cypress had been conducting broke down and the Union struck the Cypress plant. The strike was extended to the Auburndale warehouse on October 17. That day strikers appeared at the warehouse and picketed, bearing signs which read:

Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO.

The only evidence of a picket's speaking to anyone at the warehouse is the testimony of Auburndale's manager that, on the first day of picketing, he asked "some woman" on the picket line the reason for the picketing and she replied: "Well, you got our product in there".

When the picketing began on October 17, there were as many as 15 pickets at the warehouse; when it ended on or about 21, there were two pickets present. During this period, the pickets patrolled the warehouse entrance used by all truckers and employees working at the warehouse, from the opening of the warehouse in the morning until it closed in the evening. "[A]t times" pickets also patrolled the railroad siding located on Auburndale's property approximately 400 feet from this entrance. While the picketing was in progress, no Cypress truck drivers came to the warehouse. However, Cypress had 150,000 cases of concentrate stored at the warehouse throughout this period. There is no evidence that the picketing interfered with any operations at the warehouse. After the charges herein were filed, the Union stopped picketing and consented to entry of a federal district court order granting a temporary injunction.

The physical presence of the primary's employees on the secondary employer's premises is a relevant factor in determining whether the premises are a common situs. But it is not necessarily the critical factor. Here, although there were no Cypress employees at the Auburndale warehouse during the picketing, there were 150,000 cases of Cypress concentrate at the warehouse. These cases occupied ten percent of the warehousing storage space. They required continuous operations by employees of Cypress, Auburndale, and Minute Maid acting for Auburndale and Cypress. This concentrate while stored in at the warehouse was subject to the control of Cypress. Cypress gave shipping instructions for moving the concentrate from the warehouse to its customers. It is a fair statement that the storage of concentrate in the warehouse subject to disposition by Cypress constituted the final step in the Cypress production process. In the construction industry common situs cases may turn on the presence or absence of the primary's employees at the secondary employer's work-site. *Local 519, United Ass'n of Journeymen, etc.,* v. *N.L.R.B.,* D.C. Cir. 1969, 416 F.2d 1120, 1124. Here, however, the presence or absence of the primary's employees at the warehouse is of less importance than the presence of the primary's product and the close relationship of the warehousing operation to the Cypress production operation as a whole.

III. The peculiar facts of this case distinguish it from common situs cases usually recognized as authoritative. The hearing examiner relied on Warehouse Union Local 6, et al. (Hershey Chocolate Corp.), 153 NLRB 1051, 59 LRRM 1580 (1956), enf'd, 9 Cir. 1967, 378 F.2d 1; Local 868, International Brotherhood of Teamsters (Mercer Storage Co., Inc.), 156 NLRB 67 (1965); Western States Regional Council No. 8, International Woodworkers of America, AFL-CIO (Priest Logging, Inc.), 137 NLRB 352

(1962); and Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen (Fein Cam Corporation, 131 NLRB 59 (1961), enforced 2 Cir. 1962, 299 F.2d, 636. But as the Board pointed out: "In Hershey, Mercer, and Priest the dispositive issue was whether or not the secondary employer was performing struck work and was thus an "ally" of the primary; the issue of common situs was not discussed. In Fein the Primary employer's premises, which were also used by a separate trucking company, were found to constitute a common situs but the issue was not discussed with respect to a separate warehouse used by the secondary employer."

The cases on which the petitioners rely have some elements similar to the elements in the instant case, but are not close enough in the critical facts to carry the weight the petitioners attach to them. For example, in *National Maritime Union* v. *N.L.R.B. (Farmers' Union Grain Terminal Ass'n),* 8 Cir. 1966, 367 F.2d 171, cert. denied, 386 U.S. 959, the primary's employees towed barges up the river, delivered them to a fleeting area where they were tied off, picked up the southbound tows, and returned to St. Louis without ever getting off the barges. The primary employer, therefore, ceased to have any control over the barges or the material thereon after they were tied off, and accordingly maintained no presence on the tows by the time they were picketed. In *McLeod* v. *Local 810, etc., Teamsters, Chauffeurs, Warehousemen & Helpers of America,* E.D.N.Y. 1960, 182 F.Supp. 552, the picketing by the primary employer's production employees occurred at a terminal owned and operated by a trucking company which transferred goods to and from the primary employer's plant under contract. The terminal operated principally as a transfer point where over-the-road drivers deposited their goods for delivery to the primary, and occasionally as a storage point for incoming goods; however, the primary employer had no control over the transportation process, that process was

not in any sense integrated into the production process, and no part of the production process ever occurred at the terminal. Finally, although both *McLeod* v. *United Auto Workers of America, Local 365, AFL-CIO,* E.D.N.Y. 1962, 200 F.Supp. 778, and *Penello* v. *Glass Bottle Blowers Ass'n of U.S. & Canada, AFL-CIO,* D.Md., 1968, 280 F.Supp. 643, involved picketing at a warehouse belonging to a neutral employer and containing the product of the primary employer, in neither case was it either contended or shown that the storage process constituted an integral part of the primary employer's operations over which he retained substantial control. In *McLeod* v. *United Auto Workers,* etc., the primary employer had storage facilities on his own premises, had only stored his products at the neutral employer's warehouse sporadically in the past, and did so on this occasion, as in the past, solely because of a delay in the completion of some financial arrangements with his customer. In *Penello* v. *Glass Blowers,* the primary employer simply shipped in his goods via common carrier to the warehouse for storage and transshipment, retaining no further interest in or control over them.

In sum, I find that there are enough factors establishing the presence of the primary employer at the warehouse to justify the Board's conclusion that the warehouse was a common situs. I do not say that any warehouse is a common situs under the Act for the warehouseman and the primary employer who stores his goods in the warehouse.

IV. Section 8(b)(4) reflects "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 1951, 341 U.S. 675, 692. In Moore Dry Dock Co., 92 NLRB 547,

549, (1959) the Board attempted to strike a balance by permitting the union to picket at the common situs but requiring it to make every reasonable effort to limit the inherent inducements and restraints of its picket line to the primary employer and to minimize the impact on the neutrals:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. (Emphasis in original.)

The last two criteria were clearly met: the Union confined its picketing activities to the area surroundng the warehouse and stated on its signs that its dispute was solely with Cypress. Moreover, Cypress maintained a continuous presence at the warehouse during that period. The petitioner contends that Cypress was not engaged in its normal business operations at the situs of the picketing because no Cypress employees appeared at the warehouse throughout the course of the picketing to make deliveries, and therefore that the Union did not comply with the second requirement.

The determination whether an employer is engaged in normal business activities at a common situs even though none of its employees are present "depends in significant part on the reasons for this absence." Brownfield Electric, Inc., 145 NLRB 1163 (1964), and cases cited supra. Here the Cypress storage at the Auburndale warehouse did not require the continued presence of Cypress employees, since, although they delivered additional concentrate to the warehouse for storage, and occasionally returned crates of con-

centrate to the Cypress plant for repackaging before shipment to the customer, the usual storage and shipment process continued whether or not they were present at the situs. In these circumstances, the Board properly found that Cypress was engaged in its normal business operations at the warehouse during the picketing and that the Union picketed the warehouse for the primary object of disrupting those operations.

Here where the primary employer's operation is carried on not only at his own plant but also at a neutral employer's premises, the union must be permitted to appeal to those employees at the latter site who are performing work intimately connected with the struck employer's normal business operations. See, e.g., *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *N.L.R.B.*, 1964, 376 U.S. 492, 499–500, in which the Supreme Court held that the union could permissibly appeal to employees of a neutral common carrier on the carrier's own premises because it was furnishing day-to-day service essential to the primary employer's regular operations. See also, *International Brotherhood of Electrical Workers, Local 480* v. *N.L.R.B. (Gulf Coast Bldg. & Supply Co.)*, D.C. Cir. 1969, 413 F.2d 1085, 1090, n. 7.

"The essential factor which renders the analysis in General Electric [1] and Carrier applicable to Auburndale . . . is the integral relationship of the particular facility picketed to the operations of the struck employer . . ." *Samoff* v. *Oil Chemical & Atomic Workers, Local 8–732*, D.C. Del. 1969, 307 F. Supp. 434, 439.[2]

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[1] *Local 761, International Union of Electrical Workers* v. *NLRB* 1961, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed.2d 592.

[2] In *Samoff* v. *Oil Chemical & Atomic Workers, Local 8-732*, D.C. Del. 1969, 307 F. Supp. 434, the facts were "quite similar" to the facts in the instant case. The court relied on the Auburndale decision in denying the Regional Director's request for an injunction pending determination whether picketing at a warehouse was unfair labor practice committed against the warehouseman. The court found, as

I would hold that the Board properly determined that to the extent the Union was directing its appeal to common carrier employees arriving at the warehouse, the appeal constituted legitimate primary activity within the meaning of the Act.

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the Board did here, that the secondary employer's warehousing of the primary employer's products was "an integral and substantial part of the [primary employer's] operations. . . . [T]here is a substantial, integral relationship between the operations of Avisum [the primary employer] and Industrial [the owner of the warehouse].

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

177 NLRB No. 108

D-1815

Auburndale, Florida

UNITED STATES OF AMERICA

before the

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL–CIO, AND LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO

Case 12-CC-513-1

and

AUBURNDALE FREEZER CORPORATION

LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO

Case 12-CC-513-2

and

MINUTE MAID COMPANY

DECISION AND ORDER

On February 20, 1968, Trial Examiner William W. Kapell issued his Decision in the above entitled proceeding, finding that Respondents, United Steelworkers of America and its Local 6991, had engaged in certain unfair labor practices as alleged in the complaint, and recommending

that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents filed exceptions to the Trial Examiner's Decision, and a supporting brief. The General Counsel filed exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

Since on or about October 15, 1967, Respondents have been engaged in a labor dispute with Cypress Gardens Citrus Products, Inc.,[1] at its Eloise, Florida, place of business. Since on or about October 17, 1967, and continuing until on or about October 21, 1967, Respondents picketed at the truck entrance and the railroad entrance to a cold storage warehouse in which Cypress stored its product. This warehouse was owned by Auburndale Freezer Corporation.[2] Respondents' pickets carried signs which read as follows:

> Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO.

The instant case arises out of the picketing at the Auburndale warehouse.

Cypress is engaged in the business of processing citrus fruits and products. Auburndale, at all times material herein was obligated to Cypress to furnish storage space for up

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[1] Hereinafter referred to as Cypress. The dispute between Cypress and its employees arose out of contract negotiations.

[2] Hereinafter referred to as Auburndale.

to 300,000 cases of citrus concentrate (approximately 10 percent of the storage space) at a specified rental. The warehouse is staffed by three Auburndale employees, a senior managing official, a building maintenance man, and a secretary, and approximately 30 employees of Minute Maid Company [3] who, pursuant to a contract between Auburndale and Minute Maid, perform all warehousing services. No Cypress employees perform work at the warehouse, and there is no common ownership or control of operations (personnel or labor relations) between Cypress and Auburndale or between Cypress and Minute Maid. When the Cypress truck, loaded with concentrate and driven by a Cypress employee, comes onto the warehouse facility from the Cypress plant, the Minute Maid employee drives onto the truck, removes the product and places it in storage. A receipt is given the Cypress driver who then leaves the warehouse facility. Upon the sale of the goods by Cypress, which sales are nonretail, instructions are given to Auburndale to ship the product, which is then loaded by Minute Maid employees onto the designated common carrier's facility.

The Auburndale operation is seasonal, the busiest period being from March to July with the peak in June. During this period Cypress trucks arrive at the warehouse continuously. During the picketing (October 17 to October 21) no Cypress trucks came to Auburndale. Furthermore, no Cypress product was shipped from Auburndale during this period.

The Trial Examiner found, on the above facts, that the picketing took place at the plant of the secondary employer, and that Auburndale, conducting an independent business wholy distinct and separate from that of Cypress, was entirely unconcerned in the dispute between Cypress and Respondents. Relying primarily on *Warehouse Union Local 6,*

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[3] Hereinafter referred to as Minute Maid.

International Longshoremen's and Warehousemen's Union (Hershey Chocolate Corporation), 153 NLRB 1051, and citing for additional support *Local 868, International Brotherhood of Teamsters (Mercer Storage Company, Inc.)*, 156 NLRB 67, *Western States Regional Council No. 3 International Woodworkers of America, AFL-CIO (Priest Logging, Inc.)*, 137 NLRB 352, and *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen (Fein Can Corporation)*, 131 NLRB 59, the Trial Examiner concluded that the picketing violated Section 8(b)(4)(i) and (ii)(B) of the Act. Then, assuming *arguendo* that the warehouse presented a common situs situation, the Trial Examiner concluded that, because no Cypress trucks approached or arrived at the warehouse and because Cypress was not engaged in its normal business during the time of the picketing, the picketing did not meet all the conditions prescribed by *Moore Dry Dock*.[4]

Contrary to the Trial Examiner we find that the cases relied on are not controlling. In *Hershey*, *Mercer*, and *Priest* the dispositive issue was whether or not the secondary employer was performing struck work and was thus an "ally" of the primary; the issue of common situs was not discussed. In *Fein* the primary employer's premises, which were also used by a separate trucking company, were found to constitute a common situs but the issue was not discussed with respect to a separate warehouse used by the secondary employer. The Trial Examiner noted that no employees of the primary worked at the warehouse and concluded that the picketing there was unlawful.

In determining whether or not the Auburndale warehouse is a common situs the question is whether or not there is sufficient "presence of the primary" at the secondary site, or, to put the matter another way, whether the evidence is sufficient to establish ". . . that direct and immediate rela-

[4] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

tionship between the picketing and the object picketed necessary to a finding of purely primary picketing." [5] In this sense "presence of the primary" is a term of art and refers to a multitude of factors [6] that are to be evaluated in light of the union's presumably permissible "primary" objective of bringing about a complete cessation of the primary employer's operation [7] so long as its efforts are confined to a location of that operation, and of the additional and sometimes countervailing policy of the Act which seeks to protect neutral employers from being pulled into the dispute involving the primary employer.

In the present case, we note the following facts which seem to us relevant to establish the "presence of the primary" at the Auburndale location: (1) Cypress first began storing its product at Auburndale in 1956 under a general warehousing agreement; (2) Cypress and Auburndale executed a 5-year contract in January 1967, whereby the latter agreed to furnish to the former space for 300,000 cases of concentrate; (3) during the picketing Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse; (4) Cypress trucks deliver concentrate to Auburndale in the regular course of business, and during the season, March through July, do so continuously; (5) Cypress drivers remain at Auburndale until they are given a receipt for the concentrate; and (6) the concentrate is shipped

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[5] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Local Union No. 807 (Sterling Beverages, Inc.),* 90 NLRB 401.

[6] The presence or absence of the primary employer's employees at the secondary site is merely one factor and is *prima facie* relevant to both the question of whether or not the secondary site is a common situs and of whether or not the picketing is in conformity with the *Moore Dry Dock* standards. See *Seafarers International Union (Salt Dome Production Co.),* 265 F.2d 585 (C.A.D.C., 1959).

[7] See and compare *Local 761, International Union of Electrical Workers (General Electric)* v. *NLRB,* 366 U.S. 667, and *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *NLRB,* 376 U.S. 492.

from the Auburndale warehouse by common carriers in accordance with instructions given by Cypress.

These facts indicate that the concentrate, while stored at the Auburndale warehouse, is, for all practical purposes, under the control of Cypress, that the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, that there is substantial contact between Cypress, its employees, and the Auburndale warehouse, and that the storage of the concentrate at the warehouse, which practice has been continuous since 1956, constitutes an integral part of the Cypress production process.[8] To the extent that the Auburndale warehouse is a part of the Cypress operation, we conclude that the warehouse constitutes a common situs.

We conclude further that Respondents' picketing of the Auburndale warehouse conformed in all respects with the *Moore Dry Dock* requirements for legitimate common situs picketing.[9] In view of our finding that the Auburndale warehouse constituted a common situs because of the continuous "presence" of the Cypress operation at that location, it follows that it was, at all material times, a situs of the dispute. Further it appears from the facts set out above and in the Trial Examiner's Decision that the picketing was as close as possible to the situs and was, by its terms, directed solely to the primary employer, Cypress. While no Cypress trucks came to the Auburndale warehouse during the picketing, the Board pointed out in *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire and Electric Corp.),* 144 NLRB 1089, that ". . . the absence of the primary employer's employees is merely one of the factors to be evaluated in determining . . . whether

[8] *Cf. N.L.R.B.* v. *Servette,* 377 U.S. 46, wherein the term "produce" was given a broad meaning in the context of another portion of Section 8(b)(4).

[9] *Sailors' Union of the Pacific (Moore Dry Dock Company),* 92 NLRB 547.

the primary employer is then engaged in his normal business at the site," and considered ". . . it significant in this case that the absence of company employees was attributable to the fact that a majority of them were on the picket lines . . . ."[10] We find it significant here, as we did in *New Power Wire and Electric Corp., supra,* that the whole Cypress plant was out on strike. However, even if the picket line were viewed, because of the absence of the striking employees from the site, as essentially an appeal to such common carrier employees as might approach the warehouse to pick up Cypress' products, such appeals would, under the circumstances, constitute legitimate primary action.[11]

Accordingly, having found that the Auburndale warehouse constitutes a common situs and that Respondent's picketing was in accord with the requirements of *Moore Dry Dock,* we shall order that the complaint be dismissed in its entirety.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., June 30, 1969.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

National Labor Relations Board

(SEAL)

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[10] *New Power Wire and Electric Corp.,* 144 NLRB 1089, 1093, 1094.

[11] *Local 761, International Union of Electrical Workers* v. *NLRB, supra; United Steelworkers of America, AFL-CIO* v. *NLRB, supra.*

[12] We are not called upon here to, and do not, decide whether or not Respondents lawfully could have appealed to the Auburndale and Minute Maid employees not to handle the Cypress product.

Chairman McCulloch and Member Brown, dissenting:

We would affirm the Trial Examiner's finding that Respondents' picketing of the Auburndale warehouse violated Section 8(b)(4)(i) and (ii)(B) of Act. Although we agree with the reasoning of the Trial Examiner, further comment is necessary with respect to the majority's departure from established principles in diminishing the protection from direct pressures afforded neutrals under the secondary boycott provisions of the Act.

The picketing of Auburndale was in furtherance of Respondents' primary labor dispute with Cypress, a processor of citrus fruits and products. Auburndale is independently owned and operated and is engaged in furnishing warehouse services on its own separate premises to various citrus fruit processors, one of whom is Cypress. Employees of Cypress perform no functions at Auburndale's premises, other than the delivery of Cypress' products to those premises by truck. Neutral employees perform the task of unloading the trucks and perform all other warehousing tasks, including those related to the ultimate removal of products from storage and their shipment by rail or motor carrier. The picketing of Auburndale occurred not only at the truck entrances but at the railroad siding as well. During the period of picketing no trucks of Cypress were dispatched to make deliveries to the Auburndale warehouse.

The Trial Examiner concluded primarily that the Auburndale premises were not a situs of the Union's dispute with Cypress and for that reason rejected the asserted applicability, as precedents, of decisions involving picketing at the premises of employers directly involved in a dispute with the striking union. Alternatively the Trial Examiner reasoned that, assuming that a common situs might be involved, one of the criteria established by *Moore Dry Dock*[18]

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[18] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, cited by the majority at fn. 4, *supra.*

for lawful picketing at such a situs, i.e., that the primary employer must be engaged in its normal business at the situs, was not satisfied because Cypress neither made deliveries to, nor was engaged in its normal business at the site when the picketing took place. Our colleagues would reverse both of these conclusions, finding that the Auburndale premises were a common situs and that the *Moore Dry Dock* standards were satisfied, basing both of these conclusions on the single supposition that there existed a "presence of the primary" employer at the Auburndale warehouse site such as to justify Respondents' picketing, in pursuance of its primary dispute with Cypress, at that site.

We cannot agree that this is so. We believe it to be apparent that, expressed in simple terms, the "presence" of the primary employer postulated by our colleagues can mean nothing else, in this case, than the simple presence of that primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage and warehouse services to its customers. Here the employees of the primary employer, Cypress, perform no function at all in connection with the warehousing services, and the storage of Cypress' products provides but a minor portion of the business of Auburndale, the warehousing enterprise. The Board has not hitherto held, as the majority does here, that the mere presence of a primary employer's goods on the premises of a neutral employer, pursuant to an established business relationship, is sufficient in and of itself to convert the picketing of such neutral premises from unlawful secondary to lawful primary picketing.[14]

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[14] See, e.g., *Warehouse Union Local 6, et al. (Hershey Chocolate Corporation)*, 153 NLRB 1051; *Western States Regional Council No. 3, International Woodworkers, (Priest Logging, Inc.)*, 137 NLRB 352, enfd. 319 F.2d 655 (C.A. 9); *Local 810, Steel, Metals, Alloys and Hardware Fabricators, (Fein Can Corporation)*, 131 NLRB 59. *Cf. National Maritime Union of America, et al. (Farmers Union Grain*

That such is indeed our colleagues' holding here must not be obscured by their reference to precedent to demonstrate that the presence or absence of a primary employer's employees from the premises picketed is not in itself determinative of the validity of the picketing. With that proposition we agree. But we nevertheless cannot agree that it has any applicability to this case. Our understanding of the decision cited [15] and similar precedents[16] is that they have reference to situations in which employees of the primary employer are normally engaged in tasks at the picketed premises but are absent because of a strike, because the primary employer has withdrawn them to avoid the effect of picketing, or because of a workbreak, or for some other similar reason. Here no employees of Cypress, the primary employer with whom Respondents had their dispute, had ever performed tasks at the picketed premises.[17] Such employees were not simply "absent." They never were there. In this situation, the only possible thrust of Respondents' picketing

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Terminal Association), 152 NLRB 1447, 1457-58, enfd. 367 F.2d 171 (C.A. 8); *Teamsters, Chauffeurs & Helpers Union, Local 279 (Wilson Teaming Co.),* 140 NLRB 164.

We distinguish, of course, such cases as those involving "struck work" or an "ally" relationship, where the employer asserted to be neutral would not normally handle or work on the products of the primary employer were it not for the existence of a strike at the primary employer's plant. We understand that that type of situation is not involved here.

[15] *New Power Wire and Electric Corp.,* 144 NLRB 1089.

[16] See, e.g., *Seafarers International Union* v. *NLRB,* 265 F.2d 585, 590; *International Brotherhood of Electrical Workers, et al. (Plauche Electric Inc.),* 135 NLRB 250.

[17] As noted above, the drivers who brought the Cypress products to the Auburndale warehouse did no more than drive their trucks to the dock, wait for neutral employees to unload them, obtain a warehouse receipt, and depart. We do not understand Respondents to contend that it was engaged in ambulatory picketing of the trucks. But even if it were, the Board would require that such picketing be strictly limited to the trucks, and not extended in any manner to Auburndale or other neutrals.

appeal must have been directed to the neutral Auburndale, to the neutral employees engaged in warehousing tasks, or to the neutral employees of Auburndale's other customers. This is the classic example of the secondary boycott proscribed by the statute.

Dated, Washington, D. C., June 30, 1969.

FRANK W. MCCULLOCH, *Chairman*

GERALD A. BROWN, Member
National Labor Relations Board

TXD-102-68

Auburndale, Fla.

TRIAL EXAMINER'S DECISION

(Numbers and Title Omitted)

WILLIAM W. KAPELL, Trial Examiner: This matter, a proceeding under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Tampa, Florida, on November 21, 1967,[1] with all parties participating pursuant to due notice upon a complaint issued by the General Counsel on November 7,[2] alleging violations of Section 8(b)(4)(i) and (ii)(B) of the Act, by United Steelworkers of America, AFL-CIO, and Local 6991, United Steelworkers of America, AFL-CIO, hereafter referred to individually and collectively as Respondents.

The complaint, in substance, alleges that Respondents unlawfully picketed the truck entrance and a railroad sid-

[1] All dates hereafter refer to the year 1967 unless otherwise noted.

[2] Based upon a charge filed on October 19 in Case 12-CC-513-1 by Auburndale Freezer Corporation, hereafter called Auburndale, and a charge filed on October 20 by Minute Maid Company, hereafter called Minute Maid.

ing to the premises of Auburndale, an object thereof being to force Auburndale, Minute Maid, and other persons to cease handling the products of Cypress Gardens Citrus Products, Inc., herein called Cypress, and to cease doing business with Cypress. Respondents contend that the picketing was directed solely at employees furnishing day-to-day delivery service essential to Cypress' regular operations, that the picket signs were explicit, and that their dispute was solely with Cypress, and that, therefore, they were engaged in lawful primary activity.

All parties were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. The General Counsel and Respondents filed briefs which have been duly considered. Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Commerce

Auburndale, a Florida corporation, is the sole owner and operator of a cold-storage warehouse located at Auburndale, Florida, where it is engaged in the business of public cold-storage warehousing. In the course and conduct of said business operations, it annually causes citrus products valued in excess of $50,000 to be shipped from its warehouse to points located outside the State of Florida.

Minute Maid, a Florida corporation, owns and operates a plant at Auburndale, Florida, where it is engaged in the business of processing fruits and juices, and annually sells and ships products valued in excess of $50,000 to points outside the State of Florida. At all times material herein, Minute Maid leased about 50 percent of the space in Auburndale's warehouse for the storage of its citrus products.

Cypress, a Florida corporation with a plant and principal place of business located at Eloise, Florida, is engaged in the business of processing citrus fruits and products, and an-

nually ships such products valued in excess of $50,000 to points located outside the State of Florida.

Respondents admit, and I find, at all times material herein, that Auburndale, Minute Maid, and Cypress were engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Respondents admit, and I find, that, at all times material herein, they have been labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background*

Auburndale's premises have two entrances, a truck entrance (also used for ingress and egress of employees) and a railroad siding entering its premises about 400 feet from its warehouse. It warehouses products (mostly citrus) for about 20 customers, including Cypress and Minute Maid. In its operations it directly employs only three individuals, consisting of the general manager, a maintenance man, and an office secretary, but has an arrangement with Minute Maid pursuant to which about 30 Minute Maid employees, supervised by their superintendent (who receives his orders from Auburndale's general manager), perform the work of unloading incoming deliveries and placing their contents in storage, and also service outgoing shipments by removing products from storage and loading them on trucks, or freight cars.[3]

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[3] Ordinarily, Cypress sent its products for storage in its own trucks to Auburndale's truck platform where they were unloaded and placed in storage by the Minute Maid employees. Occasionally, Cypress sent its trucks to the warehouse to return some of its products to its own plant for further processing. When Cypress sold any of its storaged products, it instructed Auburndale to ship them via a designated common carrier, and Auburndale would make delivery to that carrier.

At all times material herein, Auburndale was obligated by contract with Cypress to furnish storage space for up to 300,000 cases of citrus concentrate, which approximated about 10 percent of the warehouse space, at a specified rental scale. The products of Cypress and other customers are not co-mingled, nor was any designated space reserved for such storage purpose.

B. *The Facts*

The facts concerning the issue herein are not in dispute. Cypress, which is located at Eloise, Florida, about 5 or 6 miles from Auburndale, was struck by Respondents about October 15, following a breakdown in their bargaining negotiations. At no time material herein have Respondents been engaged in any labor dispute with Auburndale or any of its customers other than Cypress. In furtherance of their labor dispute with Cypress, Respondents on about October 17 began picketing the truck entrance to Auburndale, and also on occasion at the railroad siding where it enters the premises of Auburndale.[4] The picket signs carried by the pickets read as follows: "Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO."[5] Picketing occurred during such times as the Minute Maid employees were working at the warehouse. At first, about 15 pickets appeared, milling around the truck entrance, but toward the end only two pickets appeared. On the first day of picketing, Auburndale's general manager approached the picket line to inquire as to the reason for picketing, and was told by one of

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[4] The picketing continued for two weeks, until called off pursuant to a stipulation entered into by the parties in an injunction proceeding commenced in the United States District Court, pending adjudication of the issue by the Board.

[5] Although the picket signs bore only the name of the local, the answer of each Respondent admitted the picketing.

the pickets, "well, you got our product in there." It also appears that Cypress did not send any of its trucks to Auburndale during the picketing. Nor does the record show that Auburndale shipped any of Cypress' products via a common carrier while the picketing took place.

C. *The Issue Involved*

Respondents justify the picketing as lawful on the ground that it was directed solely at employees furnishing day-to-day services essential to Cypress' operations at a "partial" situs (on the premises of Auburndale) of the dispute between the primary employer (Cypress) and the Unions.[6] In support of their position, the Unions claim that the facts of the instant case fall within the ambit of *Local 761, I.U.E., etc.* v. *N.L.R.B.,* 366 U.S. 667 (popularly known as the *General Electric* case), and *United Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, (usually referred to as the *Carrier* case).

In *General Electric,* that company was the primary employer engaged in a dispute with its own employees at its *own* plant. A number of subcontractors were performing various services for General Electric at the plant's site. Separate gates were clearly designated for the exclusive use of these subcontractors, whose work was of different types, consisting of routine maintenance services—which at times were performed by General Electric's own employees—and occasionally specialized work of a capital-improvement nature. Because of unsettled grievances, the union struck General Electric and picketed all entrances to its premises, including the gate reserved for the subcontractors' employees. The Board held that the picketing at the reserved gate was to enmesh the employees of the neutral subcontractors, and threfore violated former Section 8(b)(4)(A) (now, in pertinent part, 8(b)(4)(B)) of the Act. The Circuit

[6] In their opening statement, Respondent disclaimed any defense based on the "allied" doctrine or that they were following or picketing a product.

Court of Appeals enforced the Board's order. Upon appeal, the Supreme Court reversed the Board and the Circuit Court and ruled that picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises is lawful primary activity unless the following conditions exist.

> "There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."[7]

The Court further indicated that, if there was a "mingled use" of the reserved gate, the picketing would be primary, unless the work of the independent contractors not meeting either of the latter two conditions, referred to above, was "so insubstantial as to be treated by the Board as *de minimis.*" Inasmuch as the record theretofore made failed to show the extent to which the reserved gate had been used by the employees of the independent contractors in the performance of "conventional maintenance work necessary to the normal operation" of General Electric, the case was remanded to the Board. The Board, upon remand to determine whether the conditions set forth by the Supreme Court were satisfied, found (138 NLRB 342) that the work (other than conveyor work) scheduled to be performed by the subcontractors was necessarily related to General Electric's normal operations and constituted more than a *de minimis* amount, and it, therefore, held that the picketing was lawful primary picketing and dismissed the complaint.

In *Carrier,* that company was engaged in a dispute with its employees, at its *own* plant. The union's picketing in

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[7] *Local 761, IUE (General Electric Co.)* v. *NLRB, supra,* 366 U.S. at 631.

question took place at the gate on a railroad spur track, owned by the railroad, which was cut through a fence surrounding the struck employer's premises. This gate was used exclusively by neutral railroad employees entering the struck premises to make delivery of supplies to, and removal of manufactured products from, Carrier. The Board held (132 NLRB 127) that the railroad's services were rendered in connection with Carrier's normal operations, and that, therefore, the Union did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by its picketing of the gate. Upon appeal, the Supreme Court, *supra,* approved the Board's application of the standards set forth in *General Electric* so as to permit, as legitimate primary action, the involved picketing.

Unlike *General Electrict* and *Carrier,* both of which involved picketing at the *premises* of a *struck* employer, the picketing in the instant case occurred at the plant of a secondary employer (Auburndale), located some 6 miles from Cypress' plant, the situs of the dispute. Auburndale was conducting an independent business wholly distinct and separate from Cypress, in which none of Cypress' employees were employed. Moreover, Auburndale was entirely unconcerned in the dispute between Cypress and Respondents, and sought only to carry on its regular normal operations. In these circumstances, I find that *General Electric* and *Carrier* are sufficiently distinguishable as not to be applicable herein. The instant case closely resembles *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union (Hershey Cholocate Corporation),* 153 NLRB 1051. There, the Board held that the involved union violated Section 8(b)(4)(i) and (ii)(B) by picketing (with signs disclosing the identity of the primary employer) an independent warehouse which stored goods of the primary employer since the picketing induced employees of a neutral employer not to handle the primary employer's products, an object thereof being to force the neutral em-

ployer to cease doing business with the primary employer. See also *Local 868, International Brotherhood of Teamsters (Mercer Storage Co., Inc.) (Mid-County Buick Inc.),* 156 NLRB 67; *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, etc. (Fein Can Corporation),* 131 NLRB 59; *and Western States Regional Council No. 3, International Woodworkers of America, AFL-CIO, et al. (Priest Logging Inc.),* 137 NLRB 352.

I, therefore, conclude that the picketing at Auburndale (1) induced and encouraged individuals employed by Auburndale and other secondary employers to cease performing services for their respective employers, and (2) coerced and restrained Auburndale, an object thereof being to force or require Auburndale to cease doing business with Cypress in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Even assuming, *arguendo,* that common situs[8] picketing is involved herein, as Respondents appear to assert, I would, nevertheless, also find the picketing violative of Section 8 (b)(4)(i) and (ii)(B). For, if the picketing occurred at a common situs, then all the conditions[9] prescribed in *Moore Dry Dock Company* (92 NLRB 547) must be observed. It appears, however, that no trucks of Cypress approached or arrived at the premises of Auburndale, nor was it engaged there in its normal business, at any time while the picketing was in progress. Thus, in *Teamsters, Chauffeurs & Helpers Union, Local 279 (Wilson Teaming Company),* 140 NLRB 164, where the union picketed with signs identifying the pri-

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[8] A common situs is where two or more employers are performing separate tasks on common premises.

[9] They are (1) the picketing is strictly limited to the times when the situs of the dispute is located on the secondary employer's premises, (2) at the times of the picketing the primary employer is engaged in its normal business at the situs, (3) the picketing is limited to places reasonably close to the locations of the situs, and (4) the picketing discloses clearly that the dispute is with the primary employer.

mary employer (Wilson, a trucker) at the premises of the secondary employer (Morehouse) after the employees of Wilson left a trailer truck there for the delivery of merchandise, and departed (as was their usual practice), and while the secondary employees began to unload the truck, the Board held that when the primary employer left the premises, his work was complete until the time to haul the empty trailer away, and that under the *Moore Dry Dock* criteria the primary employer was not engaged in normal business at the site of the secondary employer and his work was not being picketed, but the secondary employer's work of unloading was. The Board, therefore, concluded that the union violated Section 8(b)(4)(i) and (ii)(B) since the union picketed the secondary employer while the primary employer was not engaged in his normal business at Morehouse.

A *fortiori,* in the instant case, Cypress neither made deliveries to nor was engaged in its normal business at Auburndale when the picketing took place. Accordingly, I conclude that even assuming that Auburndale's premises was a common situs, the picketing violated Section 8(b)(4)(i) and (ii)(B) because it failed to satisfy the *Moore Dry Dock* criteria.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth above, occurring in connection with the operations of Auburndale, Minute Maid, and Cypress, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregonig findings of fact and upon the entire record in these cases, I make the following:

Conclusions of Law

1. Auburndale, Minute Maid, and Cypress are employers engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.

2. By inducing and encouraging individuals employed by Auburndale and other secondary employers to cease performing services for their respective employers, with an object of forcing or requiring Auburndale to cease doing business with Cypress, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

3. By coercing and restraining Auburndale and other secondary employers with an object of forcing or requiring Auburndale to cease doing business with Cypress, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain action to effectuate the policies of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in these cases, I recommend that Respondents, United Steelworkers of America, AFL-CIO, and Local 6991, United Steelworkers of America, AFL-CIO, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing and encouraging any individual employed by Auburndale Freezer Corporation or by any other employer, to engage in a strike or refusal in the course of his employment to perform any services with an object of forcing or requiring Auburndale Freezer Corporation or any other employer to cease doing business with Cypress Gardens Citrus Products, Inc.

(b) Threatening, coercing, or restraining Auburndale Freezer Corporation or any other employer, with an object of forcing or requiring Auburndale Freezer Corporation to cease doing business with Cypress Gardens Citrus Products, Inc.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its business office, meeting halls, and other places where Respondent Local 6991, United Steelworkers of America, AFL-CIO, customarily posts notices, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 12 shall be posted by the Union, after being duly signed by a representative of each Respondent, immediately upon receipt thereof, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of

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[10] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

the aforementioned notice for posting by Auburndale Freezer Corporation, if it be willing, at places where it customarily posts notices to its employees.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent Local 6991, United Steelworkers of America, AFL-CIO, has taken to comply herewith.[11]

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[11] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Dated at Washington, D. C., Feb. 20, 1968.

Certified True Copy

O. W. FIELDS,
Executive Secretary, NLRB

Date Feb. 20, 1968

Appendix

NOTICE

TO ALL MEMBERS OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO; AND TO ALL EMPLOYEES OF AUBURNDALE FREEZER CORPORATION.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage any individual employed by Auburndale Freezer Corporation or any other employer, to engage in a strike or refusal in the course of their employment to perform any services

with an object of forcing or requiring Auburndale Freezer Corporation or any other employer to cease doing business with Cypress Gardens Citrus Products, Inc.

WE WILL NOT threaten, coerce, or restrain Auburndale Freezer Corporation, with an object of forcing or requiring Auburndale Freezer Corporation to cease doing business with Cypress Gardens Citrus Products, Inc.

UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 228-7711.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1526

UNITED STEELWORKERS OF AMERICA, AFL–CIO,
PETITIONER

v.

AUBURNDALE FREEZER CORPORATION, MINUTE MAID COMPANY, AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Union, in connection with its dispute with Cypress Gardens Citrus Products, Inc., picketed at the truck and railroad entrances to a cold storage warehouse owned by Auburndale Freezer Corporation in which Cypress stored its product. The pickets carried signs indicating that the Union's dispute was only with Cypress. No Cypress employees worked at the warehouse, however, and during the picketing in October 1967, no Cypress trucks came to Auburndale and no Cypress product was shipped from there. (Pet. App. 18–19.) The Board, viewing the Auburndale warehouse as a "common situs"—"a place * * * where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities," *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*

Co., 394 U.S. 369, 388–389—applied its *Moore Dry Dock* criteria for determining whether the Union's picketing there was secondary and thus violative of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B), or primary and privileged by the proviso thereto.[1] The Board, with two members dissenting, concluded that there was "sufficient 'presence of the primary'" employer, Cypress, at the Auburndale location to render the Union's picketing there primary, rather than secondary, and accordingly, it dismissed the unfair labor practice complaint against the Union issued by the Board's General Counsel. (Pet. App. 20–21, 23, 24.)[2]

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[1] In *Moore Dry Dock Company*, 92 NLRB 547, the Board ruled that, in a common situs situation, picketing would be deemed primary if it meets the following conditions (p. 549): "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *"

[2] The Board noted "the following facts which seem to us relevant to establish the 'presence of the primary' at the Auburndale location: (1) Cypress first began storing its product at Auburndale in 1956 under a general warehousing agreement; (2) Cypress and Auburndale executed a 5-year contract in January 1967, whereby the latter agreed to furnish to the former space for 300,000 cases of concentrate; (3) during the picketing Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse; (4) Cypress trucks deliver concentrate to Auburndale in the regular course of business, and during the season, March through July, do so continuously; (5) Cypress drivers remain at Auburndale until they are given a receipt for the concentrate; and (6) the concentrate is shipped from the Auburndale warehouse by common carriers in accordance with instructions given by Cypress." (Pet. App. 21–22.)

2. The court of appeals, with Judge Wisdom dissenting, held that "the finding of the majority of the Board that the picketing was entitled to primary classification is not supported by substantial evidence from the record as a whole and was legally erroneous" (Pet. App. 7). The court, in agreement with the Trial Examiner and the Board minority, found that "the real, indeed the only substantial, object for the picketing at Auburndale, * * * was to shut down operations at * * * [the warehouse] * * *. Inescapably, the purpose was to halt the operations of other employers * * * who were total strangers to the whole controversy." (Pet. App. 7.)[3] The court relied on the facts stressed by the Board minority: "Cypress sent no trucks to Auburndale while it was being picketed," nor did "Auburndale ship any of the Cypress products * * * [by] common carrier"; "Cypress' presence at Auburndale was nothing more than the presence of the 'primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage services to its customers, and * * * Cypress provided only a minor portion of the Auburndale business' " (Pet. App. 3-4, 5). The court set aside the Board's dismissal of the complaint and remanded the

[3] The Auburndale warehouse is staffed by three Auburndale employees, and approximately 30 employees of Minute Maid Company, who, pursuant to a contract between Auburndale and Minute Maid, perform all warehousing services. Auburndale warehouses products (mostly citrus) for about 20 customers, including Cypress and Minute Maid. Auburndale was obligated by contract with Cypress to furnish storage space for up to 300,000 cases of citrus concentrate, which would occupy approximately 10 percent of the warehouse space. (Pet. App. 29–30.)

case to the Board with directions to enter the remedial order recommended by the Examiner (Pet. App. 7).

3. The basic question here is whether Cypress was sufficiently engaged in its normal business operations at the Auburndale warehouse to permit the Union to carry its picketing against Cypress to those premises, where it would necessarily have an impact on the neutral employers sharing the warehouse.[4] While the Board believes that the court below erred in reversing the Board on this question, the issue turns on the particular facts of this case relating to the extent of Cypress' presence at the warehouse and hence, in the Board's view, does not warrant review by this Court.[5]

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[4] The situation here is distinguishable from that in *Electrical Workers* v. *Labor Board* (General Electric), 366 U.S. 667, and *Steelworkers* v. *Labor Board* (Carrier), 376 U.S. 492, where picketing directed at neutral employers was held to be privileged because they were performing work related to the normal operation of the primary employer's business. In those cases, the work was being done at or adjacent to the primary employer's plants. Here, the picketing in issue did not occur at Cypress' premises, but at those of a secondary employer, Auburndale.

[5] Although the court below stated that the "case is of supreme public importance" (Pet. App. 5), a reading of its opinion as a whole indicates that its decision rests on the particular facts, as does the Board's decision (see n. 2, *supra*). Moreover, the dissenting judge emphasized the "peculiar facts of this case," and expressly stated that he was not holding that "any warehouse is a common situs under the Act for the warehouseman and the primary employer who stores his goods in the warehouse" (Pet. App. 11, 13).

Finally, since the Board found that, during the picketing, Auburndale did not ship any of the Cypress products by common carrier (Pet. App. 19), the question whether the union may appeal to employees of common carriers not to pick up goods of the primary employer stored in an independent warehouse (Pet. 2, 8) is not presented here.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,

General Counsel,
National Labor Relations Board.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1526

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

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AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision and order of the National Labor Relations Board, 177 NLRB No. 108, 71 LRRM 1503, is reproduced in the Appendix of the Petition, pages 17-39. The opinion of the Court of Appeals is reported at ____ F.2d ____, 75 LRRM 2752, and is reproduced in the Appendix of the Petition, pages 1-16.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Can a union, engaged in a dispute with a primary employer and successful in shutting down the primary employer's plant, lawfully extend its picketing to an independently owned and separately located warehouse where there is stored a small portion of the primary employer's product?

STATEMENT OF THE CASE

Cypress Garden Citrus Products, Inc. (hereinafter "Cypress") is engaged in the business of processing citrus fruits and products (A. 47).[1] Cypress has a plant which is its principal place of business at Eloise, Florida (A. 47).

Respondent, Auburndale Freezer Corp., (hereinafter "Auburndale") is the sole owner of a public cold storage warehouse located in Auburndale, Florida, approximately five to six miles from Cypress' plant (A. 45, 84). Auburndale has only three employees—a general manager, an office secretary and a maintenance man. (A. 72, 73).

Auburndale has a contract with Respondent Minute Maid which provides that 30 employees of Minute Maid will perform work of unloading deliveries at the Auburndale warehouse, furnishing bills of lading, placing the contents in storage and servicing outgoing shipments on freight cars and trucks (A. 46). Those employees work under the direction of Minute Maid's superintendent, who, in turn, takes his instructions from Auburndale's general manager (A. 101).

When a truck loaded with citrus products arrives at the unloading platform, Minute Maid employees,

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[1] As used herein, "A" refers to the Appendix in the Court below.

using a fork lift, drive on to the customer's truck, remove the product and place it in storage. The driver of the truck performs no work while at the warehouse premises. The driver customarily sits in the cab until the unloading is finished at which time he is given a receipt for the product (A. 77).

Cypress is one of some 20 depositors who store goods at the warehouse facility (A. 95). Cypress has stored goods at Auburndale since 1956 (A. 87). Pursuant to a five year written contract entered into in January 1967, Auburndale guarantees Cypress sufficient storage area for 300,000 cases of citrus concentrate (approximately 10% of the Auburndale storage space) (A. 74). No portion of the warehouse is set aside under this contract for Cypress' stored products (A. 75).

In addition to the case concentrate, Cypress stores drum concentrate at Auburndale which is occasionally returned to Cypress for further processing. However, the General Manager of Auburndale testified that none had been returned during 1967 (A. 78, 79).

Cypress also stores citrus products on its own premises and at other cold storage warehouses (A. 94, 95). Auburndale's General Manager testified that in his opinion the Cypress storage at Auburndale's warehouse constituted a minute part of Cypress' overall business operation (A. 98).

On October 15, 1967, after a breakdown in bargaining negotiations, Local 6991, United Steelworkers of America, AFL-CIO, struck Cypress (A. 48, 49, 66). Two days later, about 15 striking Cypress employees began picketing at the premises of the Auburndale warehouse facility (A. 49, 82). At the time of the picketing,

Cypress' products occupied approximately 5% of the total warehouse space (A. 94).

The picketing took place at the only truck entrance to the warehouse as well as at a point where the railroad siding entered the premises some 400 to 500 feet away (A. 82, 111).[2]

On the first day of picketing, Auburndale's General Manager went to the picket line and asked the pickets why they were picketing Auburndale. A female picket stated: "Well, you got our product in there." (A. 83).

The picketing generally took place at the times when the Auburndale and the Minute Maid employees were working on the warehouse premises. As soon as their activity ceased at the warehouse the pickets would leave (A. 97). At no time during the picketing did any Cypress trucks or employees come to the warehouse for the pickup or delivery of citrus products (A. 86). There was also no evidence in the record of any shipments of Cypress' citrus products by truck or by rail during the picketing.

The picketing lasted until approximately November 6 or 7, 1967, at which time the pickets were removed pursuant to an agreement between the General Counsel and the Steelworkers' attorney to abstain from picketing pending resolution of the unfair labor practice charges before the Board (A. 26, 66).

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[2] The picket signs used read, "Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO." The words "ON STRIKE" were in large letters whereas the remainder of the wording on the picket signs was in much smaller letters. Auburndale's Vice President and General Manager testified that you had to get, "right up close to read any of the other" letters (A. 95, 96).

Respondents Auburndale and Minute Maid separately filed unfair labor practice charges against the Union. The General Counsel consolidated the cases and issued a complaint that the Union had engaged in picketing with the object of forcing and requiring Auburndale, Minute Maid and others to cease using, selling, handling, transporting or otherwise dealing in the products of and to cease doing business with Cypress, contrary to Section 8(b)(4) of the Labor Management Relations Act of 1947, 29 USC §158 (b)(4).[3]

Pursuant to a hearing held in due course, the Trial Examiner concluded that the picketing was unlawful under the secondary boycott provisions of Section 8(b)(4)(i)(ii)(B) of the Act. Upon exceptions to the Trial Examiner's Decision, the case was heard by all members of the National Labor Relations Board.

A majority of the Board [3-2] disagreed with the Trial Examiner. Over the sharp dissent of Chairman McCulloch and Member Brown, the Board held that picketing at Auburndale, an unconcerned neutral employer, was legal. The rationale of the Board was that Cypress, the primary employer, had "sufficient presence" at the warehouse (App. of Petition, 20, 21). The Board held that Cypress' activities at Auburndale constituted an integral part of the Cypress production process and that the warehouse "to the extent that [it] is a part of the Cypress operation" constituted a *common situs* (App. of Petition, 22). The Board then concluded that since the picketing was in accord with the *Moore Dry Dock* requirements, it constituted legitimate common situs picketing (App. of Petition, 22).

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[3] The relevant portion of Section 8(b)(4) is quoted at App. of Petition, page 1, n.1.

The Board's majority then added that even if the *Moore Dry Dock* standards were not met, the picketing would constitute primary action. As authority for this statement, the Board cited in a footnote, *General Electric* and *Carrier,* but never discussed or analyzed the principles of those cases (App. of Petition, 23).

Respondents Auburndale and Minute Maid petitioned for review of the Board's decision. The Fifth Circuit Court of Appeals held that the picketing was secondary and therefore unlawful. The Circuit Court rejected the Board's approach and recognized ". . . that this case may not be decided on strained or ephemeral extensions or constructions of *situs,* applied out of context." (App. of Petition, 6). The Court properly reviewed the statutory language of §8(b)(4) and noted that the Union's object was the key consideration in determining the legality of the picketing (App. of Petition, 6). With regard to the legality of picketing five or six miles from the struck plant at a public warehouse where there is stored a small portion of the struck employer's goods, the Court found that "There is no rational basis in this record upon which reasonable men might differ as to the facts." (App. of Petition, 7). The Court then found that the inescapable purpose of the picketing was to halt the operation of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy (App. of Petition, 7).

ARGUMENT

I. THERE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

Petitioner insists that there is implicit in the prohibition by the Fifth Circuit Court of Appeals of a Union's picketing of a secondary neutral employer's premises wherein there is stored a small portion of the primary employer's goods, an important question of federal law which this Court should decide.

The Petitioner asserts, without reference to any portion of the opinion below, that the opinion is grounded upon the premise that all picketing directed solely at neutral employers is unlawful. A careful reading of the Court's opinion makes clear that its holding is based on the particular facts of this case rather than on an assumption which Petitioner imagines is present.

Petitioner next asserts that an important federal question must be present because of the economic impact of the Court's decision, citing the *amicus curiae* brief filed by the American Warehousemen's Association wherein it was noted that in excess of $50,000,000,000 annually of the United States' gross national product is handled through warehouses similar to Auburndale Freezer. It is true that the decision of the National Labor Relations Board had a very substantial, potential impact on the American economy by permitting any warehouse to be picketed if a customer of the warehouse is engaged in a labor dispute. The Fifth Circuit noted the effect of the Board's ruling and the resulting question before the Court by stating:

> "This case is of supreme public importance." (App. of Petition, 5).

The Court then noted the specific reasons why the case, as it stood before the Court, was of "supreme public importance":

> "The inescapable effect of the Board decision would be to inject a public warehouse operator and other employers who use his facilities into the labor disputes of all customers. A public warehouse could be subject to picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse. The impact on the general welfare could be especially critical in those instances where, as here, perishable food products intended for human consumption are substantially involved." (App. of Petition, 5, 6).

The Court then reversed the Board's decision, thus eliminating the economic impact of the picketing and the potential effect of the picketing on the nation's food supply and general economy. Therefore, as a result of the Fifth Circuit's reversal of the Board decision, the case is no longer of "supreme public importance".

On this same question, it must be noted that the National Labor Relations Board, the agency initially charged with the application and enforcement of the nation's labor laws and policy, has not seen fit to independently seek a petition for a writ of certiorari, nor has the Board joined the Petitioner in seeking the instant writ. This would imply that the Board does not consider the case, in its current posture, to be one of "supreme public importance".

It would appear that the Petitioner, in seeking to invoke this Court's jurisdiction, has disregarded the words of Chief Justice Taft in *Magnum v. Coty,* 262 U.S. 159, 163 (1923):

"The jurisdiction of the Supreme Court to review cases by way of certiorari *was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*" (Emphasis supplied)

II. THERE IS NO CONFLICTING DECISION

At the outset, it must be recognized that what the Petitioner seeks is the right to picket a product of a struck employer, wherever it may be located.

In concluding that the Fifth Circuit's opinion in the instant case is in conflict with the principles enunciated in prior decisions of this Court, the Petitioner relies directly upon the decisions in *Local 761, International Union of Electrical Workers* v. *NLRB* (General Electric Co.),[4] 366 U.S. 667 (1961) and *United Steelworkers of America v. NLRB* (Carrier Corp.),[5] 376 U.S. 492 (1964).

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[4] In *General Electric,* the Union picketed at a separate gate located on the *primary employer's premises* but used exclusively by the subcontractors of the primary employer. This Court held that if the work performed by the employees using the gate (secondary employees) was related to the day-to-day operation of the primary employer's plant, then picketing of the gate was legal because it was primary activity. In fact, in the *Carrier* case, which relied upon *General Electric,* the Court at page 497 of the opinion, noted that *General Electric* stood for the proposition that picketing was *not* to be protected simply because it occurred at the site of the primary employer's premises. Thus, the effect of the Court's ruling was to prohibit certain picketing by the union on the primary employer's property.

[5] In *Carrier,* the Union picketed a gate located in a chain link fence which surrounded the primary's and the railroad's property. In fact, Carrier had deeded the right-of-way in question to the railroad. The specific issue before the Court, as stated by Justice White at page 493 of the opinion, was the legality of picketing an entrance, used exclusively by railroad personnel, to a railroad spur track located on a right-of-way owned by the railroad and adjacent to the struck employer's premises.

In *General Electric* this Court placed certain limitations on *primary* picketing which occurred on the primary employer's property. Here, the Petitioner seeks to make legal *secondary* picketing which occurs off of and several miles away from the primary employer's (Cypress') premises.

While Petitioner asserts that the Fifth Circuit's decision conflicts with the principles announced by this Court in *Carrier,* it ignores the obvious differences between the instant case and the prior decisions of this Court. As noted, one of the primary distinctions is the locus of the picketing. Based on *Carrier,* Respondent concedes that there are certain limited situations in which picketing can legally take place on property owned by one other than the primary employer. However, *for purposes of the picketing,* this Court in *Carrier* considered the railroad's right-of-way as property of the primary employer.

In *Carrier* the Court noted two factors of particular significance to the instant case. First, "There was no other place where the union could have brought home to railroad workers servicing Carrier its dispute with Carrier." 376 U.S. 492 at 500. In the case at bar, the primary struck employer warehoused a portion of its product at its own warehouse (A. 68, 94). Obviously, there was an opportunity for the Petitioner to appeal to common carriers when the carriers arrived at the cold storage warehouse located on the premises of the primary employer. Thus, contrary to the situation in *Carrier,* where there was no other place where the union could have brought home to the railroad workers its labor dispute, the Petitioner had every opportunity, by picketing the premises of the primary, to publicize its dispute to common carriers.

Secondly, the Court noted that the picketing in *Carrier* was, for the purposes of Section 8(b)(4), legitimate primary picketing because the situs of the picketing was proximate to the premises of the struck employer. This necessarily relates to the prior finding that, absent the right on the part of the union in *Carrier,* there would have been no opportunity for the union to appeal to common carrier employees. In the current situation, the Respondent, Auburndale Freezer, is located five or six miles (A. 84) from the premises of the primary employer. Thus the "proximateness" considered to be of singular significance by this Court in the statement of the issue and the holding in *Carrier* is absent in the present case.

Petitioner's asserted conflict with the principles of *General Electric* and *Carrier* also overlooks the fact that decisions subsequent to *General Electric* and *Carrier* have narrowly construed the principles enunciated in those cases. In *Building and Construction Trades Council of New Orleans, AFL-CIO and Markwell and Hartz, Inc.,*[6] 155 NLRB 319 (1965), the Board refused to extend the rationale of *General Electric* and *Carrier* to a common situs. In so holding, the Board, at page 325 of its opinion, noted:

> "Nor do the Supreme Court's decisions in *General Electric* and *Carrier* detract from our opinion

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[6] In *Markwell and Hartz,* the primary struck employer was a general contractor. The situs of the work was a construction project on property owned by a third party. The primary had subcontracted a portion of his work to subcontractors, as is customary in the construction business. When the union picketed Markwell and Hartz, Markwell and Hartz immediately established separate gates for the use of employees of the neutral subcontractors. The union continued to picket, including the picketing of gates reserved solely for the use of employees of neutral subcontractors. This led to the filing of charges by Markwell and Hartz and the eventual Board holding that the picketing of the reserved gates was in violation of 8(b)(4).

> in this regard; for, the mere fact that picketing of a neutral gate *at premises of a struck employer* may in proper circumstances be lawful primary action, does not require a like finding when a labor organization applies *direct* pressure upon secondary employers engaged on a common situs." (Board's emphasis)

The decision of the Board was enforced by the Fifth Circuit in *National Labor Relations Board* v. *Building and Construction Trades Council of New Orleans, AFL-CIO,* 387 F.2d 79 (5th Cir. 1967), and certiorari was denied by the Supreme Court, *Building and Construction Trades Council of New Orleans, AFL-CIO* v. *National Labor Relations Board,* 391 U.S. 904 (1968). The Board, with Fifth Circuit and Supreme Court approval, refused to extend *General Electric* and *Carrier* beyond the premises of the primary employer to a common situs. Certainly they are not to be extended to a *secondary* situs.

Petitioner contends that it has the right to appeal to secondary employees not to perform duties connected with the normal day-to-day operations of the struck employer. As support for this contention, Petitioner again cites *General Electric, supra, Carrier, supra,* and *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369 (1969). As noted previously, the picketing in both *General Electric* and *Carrier,* for purposes of 8(b) (4), took place at the premises of the struck employer. The same is true with regard to *Jacksonville Terminal.* The struck employer was the Florida East Coast Railroad; the railroad was one of the four owners of the picketed Jacksonville Terminal. Thus, each of the cases relied upon by the Petitioner involved, for purposes of 8(b) (4), picketing at the struck employer's premises.

For purposes of argument, and ignoring the decisive factor that *General Electric, Carrier* and *Jacksonville*

Terminal dealt with picketing at or immediately adjacent to the property owned by the primary employer, the most accurate statement of what constitutes the "day-to-day operations of the struck employer" is found in the decision by Judge Blackmun (now Justice Blackmun) in *National Maritime Union of America, AFL-CIO* v. *National Labor Relations Board,*[7] 367 F.2d 171 (8th Cir. 1966); *cert. denied* 386 U.S. 959 (1967). In response to the union's claim that the services performed by Farmer and Twin City Barge employees were part of the day-to-day operations of Mid-American Transportation (MAT), Judge Blackmun said:

> "The concept of what is necessary to the day-to-day operations of MAT must have its limitations, too. Fuel, for example, is necessary in the operation of MAT's towboat. Picketing the towboat might well effect economic pressure on any fuel supplier whose delivering employees refuse to cross the picket line. That picketing, by the cases cited, would be legal primary picketing. However, if NMU were to picket the supplier's Kentucky coal mine or its Oklahoma refinery, that picketing, by the same cases, would be proscribed. Yet both situations concern the fuel which is necessary to MAT's daily operations. *The distinction lies in the situs.*" (Emphasis added)

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[7] In *National Maritime Union (NMU),* the union represented employees who worked on board barges and tow boats owned by Mid-American Transportation (MAT). MAT handled cargo on the Mississippi River between East St. Louis and the mooring area at Inver Grove, a few miles downriver from St. Paul, Minnesota. No MAT towboats go upriver beyond the Inver Grove area, nor were there any MAT employees on the barges when the barges were towed by independent contractors upriver from Inver Grove. Shortly after a strike against MAT began, the NMU picketed a MAT barge when it was being towed upriver by Twin City Barge, a company which regularly towed MAT barges upriver from Inver Grove. No MAT employees were present at the time. These, and other similar acts resulted in the filing of 8 (b) (4) charges with the National Labor Relations Board.

Thus, even though the barges were the normal situs of the employees' work, and even though the hauling, cleaning, loading and unloading of the barges were necessary to the daily operations of MAT, the picketing of MAT owned barges in the complete absence of MAT employees was unlawful because, in the words of Judge Blackmun, "The distinction lies in the situs."

In view of the obvious lack of conflict between *General Electric* and *Carrier,* particularly as these cases have been subsequently applied by the Board and the Circuit Courts, there are no grounds for the granting of certiorari on the basis of conflict.

III. LOWER COURT DECISION IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF LAW.

To permit the Petitioner to picket the premises of Auburndale Freezer would destroy the long standing rationale of the "ally doctrine."[8] In order to prevent an employer from escaping the economic impact of a strike by subcontracting the struck employer's normal produc-

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[8] There are two recognized tests to determine if an employer is an ally of a struck employer and thus denied the protection of §8 (b) (4). The first test is whether the secondary employer is an ally of the struck employer to the extent that he cooperates with the struck employer by doing the struck employer's work so that he is no longer disinterested or neutral in the labor dispute, thereby forfeiting his privilege as a neutral. The second test is the so called "straight line operation" test. When the primary and secondary employers, although separate legal entities, are commonly owned or controlled or are engaged in closely integrated operations, they are to be regarded as a single employer under the Act and hence they are "allies" in, and parties to a union's dispute with the primary employer. However, for the purposes of "integrated activities", the two companies must be so integrated and so interdependent that they must be regarded as a single operation. See *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union and Hershey Chocolate Corporation,* 153 NLRB 1051 (1965) at 1060, 1061.

tion work to independent contractors at the time the strike begins, the "ally doctrine" was developed.

Keeping in mind the long established business relationship between Cypress and Auburndale (A. 88), the Auburndale case is factually similar to *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union* and *Hershey Chocolate Company* (Hershey),[9] 153 NLRB 1051 (1965).

In *Hershey,* when the independent warehouse where Hershey stored its product was picketed, the Hershey Co. filed charges with the National Labor Relations Board charging a violation of 8(b) (4) of the Act. The union defended, claiming the warehouse was an ally of Hershey. The Board noted that the ally doctrine was an exception to the general prohibition of strike activity at the premises of a secondary employer. The Board in noting that the warehouse was not an ally found that Hershey was not performing struck work. The holding necessarily infers that the fact the warehouse was used for the storage of Hershey goods did not make it an integrated part of the primary's operation so as to make the warehouse an ally.

What the Petitioner asks this Court to do, in seeking certiorari, is to destroy the ally doctrine as it now exists by making *every* employer who performs the smallest task for a primary struck employer, an ally of the primary.

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[9] In *Hershey,* Hershey decided to close down its warehouse and store its product at an independent warehouse, Encinal Terminals. At the same time, Hershey was anticipating the construction of a new warehouse and manufacturing facility. The ILWU, as representative of the employees at Hershey's closed facility, demanded that the employees terminated as a result of the closing be hired at the new operation and that the union be recognized as the representative of the employees. Hershey refused, whereupon the union began picketing the Encinal Terminal where Hershey's goods were warehoused. A strike against Hershey subsequently developed.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief for Respondent in Opposition has been served by mail this _____day of May 1971, on:

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Supreme Court of the United States
OCTOBER TERM, 1970

NO. 1526

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE OUT OF TIME BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file a brief *amicus curiae* out of time in support of the Petition.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-one affiliated labor organizations having a total membership of approximately thirteen and one-half million working men and women.

In the instant case the Court of Appeals fashioned a *per se* rule prohibiting picketing to urge common carrier employees not to pick up the struck employer's goods stored

at a warehouse owned by a third person. Pet. App. pp. 5-7. This rule thwarts achievement of the basic aim of the primary strike—"halting the day to day operations of the struck employer," *Steelworkers* v. *Labor Board (Carrier),* 376 U.S. 492, 499, through an illegitimate narrowing of the ambit of primary picketing. It is based on a proposition, that there is a "real situs" of a labor dispute which is "the place for primary picketing" so that picketing at any other place is "secondary" and forbidden by § 8(b)(4)(B) of the National Labor Relations Act, that is entirely inconsistent with this Court's decisions since *Electrical Workers* v. *Labor Board (General Electric),* 366 U.S. 667, 674-681.

The Act directs management and labor to make their own bargain; it "does not attempt to control the results of negotiations." *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 488. In this process "economic force" is recognized as a "prime motive power for agreement" and there is no doubt that "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess" (361 U.S. at 489). The decision below severely restricts the use of labor's "major [economic] weapon . . . primary picketing" (*Carrier,* 376 U.S. at 499). The profound interest of the Federation is therefore manifest.

REASONS FOR GRANTING THE MOTION

The request to file the attached Brief *Amicus,* and the reason for filing it out of time, are due to a single cause: the submission by the National Labor Relations Board of a Memorandum which, while agreeing with the Union that the decision below is wrong, nevertheless opposes review to correct that error.

At the time that the Union filed its Petition, no brief *amicus* appeared necessary. The propriety of certiorari seemed obvious: the Court of Appeals itself had recognized the "supreme public importance" of the case (Pet. App. p. 5), the majority opinion declared a *per se* rule based on

the doctrine, contrary to the settled law in this Court, that there is a single "real situs" of a labor dispute which is "the place for primary picketing" (Pet. App. p. 6); Judge Wisdom had written a careful and comprehensive dissenting opinion; and the underlying Board decision was a model of the reasoned exposition which this Court requires of administrative agencies. The Union was therefore able to fully and fairly state the reasons for granting the writ in a concise presentation limited to four pages. Under these circumstances a brief *amicus* in support of the Petition seemed superfluous, an imposition on this Court, contrary to the spirit of Rule 42 (1).

But the filing of the Memorandum in Opposition by the Board altered the posture of this case. Board counsel's views as to the propriety of review in one of the Board's own cases inevitably carry weight with this Court, particularly in gauging the importance of the issue presented. And it is precisely because the Memorandum in Opposition may tend to create substantial, albeit unwarranted, doubt as to the propriety of review, when there could be none before, that we deem it necessary to take the unusual step of seeking leave to file a brief *amicus* in support of the Petition, and to do so out of time. We seek this opportunity to rebut that Memorandum in order to demonstrate that its argument is undermined by two fatal defects. Briefly stated they are:

First, while asserting "that the Court below erred in reversing the Board" (Mem. p. 4), the Memorandum fails to give the Board's reasoning its full due. It does not quote, or otherwise refer to, the Board's basic conclusion that picketing took place at a location which "constitutes an integral part of the [struck employer's] production process." Pet. App. p. 22. Moreover, it goes so far as to venture a distinction of the very precedents in this Court which the Board itself followed in its decision. Compare Mem. p. 4 n. 4 with Pet. App. p. 21 n. 7 and p. 23 n. 11. We submit that even as appellate counsel cannot save the

decisions of administrative agencies by post-hoc rationalizations, (cf., *Burlington Truck Lines* v. *ICC*, 371 U.S. 156, 168, followed in *Metropolitan Life Ins. Co.* v. *Labor Board*, 380 U.S. 438, 444) they should not be heard to scuttle them by such means.

Second, the Memorandum argues that the decision of the court below rests on its "particular facts" (Mem. p. 4 n. 5). While as an effort to limit the impact of that decision this may be an understandable litigation strategy, and while the Board itself in its decision-making process may henceforth treat the court's decision as a "derelict up the waters of the law," *Lambert* v. *California*, 355 U.S. 225, 232 (Frankfurter J., dissenting), the opinion does not permit a restrictive reading. See the Argument, pp. 5-8, *infra*. Moreover, whatever the Board may choose to do in its own decisions, the District Courts in the Fifth Circuit are bound by the ruling below in the exercise of their coordinate jurisdiction to enforce § 8(b)(4) of the Act in suits for damages under § 303. The right of unions to engage in what this Court has held to be protected primary activity is thus subject, at least in that Circuit, to the substantial sanction of damage suits, even if the Board would not issue unfair labor practice complaints and seek injunctions against the same picketing.[1]

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[1] But cf. *Samoff* v. *Oil, Chemical & Atomic Workers*, 307 F.Supp. 434 (D. Del. 1969), where the Board's general counsel pressed for a 10(1) injunction on facts identical to those of the present case even after the Board's decision herein, notwithstanding the admonition of *McLeod* v. *Local 459 I.U.E.*, 300 F.2d 237, 241-242 (C.A. 2, Marshall, J.). The District Court denied the injuction, stating that the "Board's conclusion concerning the primary character of the picketing in *Auburndale* seems consistent with the principles recognized in the *General Electric* and *Carrier* cases," 307 F.Supp. at 439.

CONCLUSION

For the above-stated reasons, this motion to file the accompanying brief *amicus* in the instant case in support of the Petition should be granted.

Respectfully submitted,

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May, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1526

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This Brief *Amicus Curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent upon the Court's granting the foregoing Motion For Leave To File A Brief As *Amici Curiae* Out Of Time.

The opinions below, the basis of this Court's jurisdiction, the question presented, and the statutory provisions involved are set out on pp. 1-2 of the Petition.

The interest of the AFL-CIO is set out on pp. I-II of the above-noted Motion.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT, FOR IT RESTS ON THE DISCREDITED THEORY THAT THERE IS A "REAL SITUS" OF A LABOR DISPUTE AT WHICH ALONE PRIMARY PICKETING IS LAWFUL.

The question in this case is whether picketing by striking employees to urge common carrier employees not to pick up the struck employer's goods stored at a warehouse owned by a third person, where the storage "constitutes an integral part of the [struck employer's] production process" (Pet. App. p. 22), is primary activity protected by §§ 7 and 13 of the National Labor Relations Act.

The majority of the Court of Appeals answered this question in the negative.

It held that the Union violated § 8(b)(4)(B) by picketing at the Auburndale warehouse in support of its dispute with the struck employer, Cypress, because Auburndale was not the "real" or "true" situs of the dispute. It reasoned as follows:

> "There was no strike against Auburndale or Minute Maid or against the nineteen other employers who stored their products at that warehouse.
>
> "The processing plant of Cypress, five miles from Auburndale, was, of course, struck and picketed. That is where the employees of Cypress processed the citrus. That was the real situs of both the dispute and the strike. That was the place for primary picketing. No Cypress employees were at work at Auburndale, and never had been.
>
> • • •
>
> "We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary

employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten per cent." (Pet. App., pp. 6, 7.)

1. The proposition that there is a "real situs" of a labor dispute which is "the place for primary picketing," so that picketing at any other place is "secondary" and forbidden by § 8(b)(4)(B), is entirely inconsistent with the decisions of this Court. *Electrical Workers* v. *Labor Board (General Electric)*, 366 U.S. 667, 674-681; *Steelworkers* v. *Labor Board (Carrier)*, 376 U.S. 492, 496-500; *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 387-390; *NLRB* v. *Operating Engineers*, 400 U.S. 297, 303-304. For a limitation on the right to engage in picketing, such as was declared by the majority below, fails to take into account the truth that the "primary strike . . . is aimed at applying economic pressure by halting the day-to-day operations of the struck employer" (*Carrier*, 376 U.S. at 499). To achieve that end it is necessary to shut down the struck employer's entire production process from its start, the receipt of raw materials, to its completion, the delivery of the finished goods. A strike is effective only to the extent that it prevents the employer from continuing to reap profits from the struck operation. This generally requires, both appeals not to work to those who would substitute their labor for that of the strikers, and appeals not to provide the struck employer with direct assistance to those who would deliver goods to the employer or make pickups from him. Thus, "appealing to neutral employees whose tasks aid the employer's everyday operation . . . [is a] traditional primary activity" (*General Electric*, 366 U.S. at 681).

This Court has, therefore, squarely held that "Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations" (*Carrier*, 376 U.S. at 499).

Carrier was decided in the context of picketing at a railroad gate adjacent to a struck plant aimed at halting

deliveries to that plant. The rule there announced is not, however, limited to these precise facts. Pickups of the struck employer's finished goods are as integral to his attempt to operate in the face of a strike as the receipt of deliveries. Moreover, the incidental secondary effects of both forms of picketing are indistinguishable. Thus *Steelworkers* v. *NLRB (Phelps Dodge)*, 289 F.2d 591 (C.A. 2), approved in *General Electric*, 366 U.S. at 681, as stating the "controlling considerations," expressly holds that unions may direct their picketing at "employees . . . coming to deliver or pick up the ordinary raw materials and products of the [struck] business." 289 F.2d 594

Moreover, it is clear from *Jacksonville Terminal*, which characterized *General Electric* and *Carrier* as cases which govern "common situs picketing" (394 U.S. at 389), that those decisions cannot be explained away as dealing only with picketing at or near the primary employer's plant. The argument of counsel to that effect (Mem. p. 4, n. 4) is also inconsistent with the decision of the Board. For after the Trial Examiner had ventured precisely that distinction (Pet. App. pp. 31-33), the Board not only reversed his conclusion but relied on *General Electric* and *Carrier* to validate the picketing. "The key" to the functional rule evolved in *General Electric*, and reaffirmed in *Carrier*, is "the type of work" which the secondary employees are being "solicited not to perform (366 U.S. at 680). Where a portion of the struck employer's "normal business operations" takes place away from his plant a rule which insulates that site from picketing directed at employees "whose tasks aid the employer's everyday operations" (*General Electric*, 366 U.S. at 681) would frustrate the central aim of the legitimate primary strike—to halt "all phases of the [struck employer's] normal operations" (*Operating Engineers*, 400 U.S. at 304). And it would do so without furthering any substantial legitimate interest; for the effect on third persons of picketing directed solely at those "whose tasks aid the employer's everyday operations," to induce them not to

perform those tasks where that operation is located away from the plant, is indistinguishable from the effects of such picketing at the employer's plant.

The view that there is a situs at which alone picketing is permissible gained brief currency at the Labor Board where it was known as the *Washington Coca-Cola* (107 NLRB 299) doctrine. That doctrine was uniformly disapproved by the courts, most notably in the opinion of Judge Rives in *NLRB* v. *General Drivers,* 255 F.2d 205 (C.A. 5), and of Judge Fahy in *Sales Drivers* v. *NLRB,* 299 F.2d 514 (C.A.D.C.). As the court pointed out in *General Drivers,* the defect in *Washington Coca-Cola* was that the:

> "ultimate and controlling statutory inquiry . . . whether the unlawful objective denounced by the statute actually existed . . . may [not] be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act. . . ." 225 F.2d at 209, quoted with approval in *Sales Drivers,* 229 F.2d at 518.

General Electric completed the process of extirpating reliance on the "location of the picketing" as a "decisive factor" (*Carrier,* 376 U.S. at 499) begun in *General Drivers* and *Sales Drivers. General Electric* disapproved the theory of such cases as *United Electrical Workers (Ryan Construction Corp.),* 85 NLRB 41, that all picketing at the employer's home plant is perforce primary picketing. As noted, p. 4, *supra,* it did so on the basis that "the key to the problem" is the "type of work" which the secondary's employees are being solicited not to perform (366 U.S. at 680). Contrary to *Washington Coca-Cola,* therefore, the location of the picketing cannot serve to make that which is "primary" under the proper functional test "secondary," and contrary to *Ryan Construction,* the location of the picketing cannot make that which is "secondary" under that test "primary."

Thus as *Carrier* shows, while location continues to be "important" as an evidentiary aid in determining the picketing union's objective after *General Electric* it cannot override a showing that the common carrier's "operations for the [struck employer] were in furtherance of [that employer's] normal business;" that the picketing was directed at bringing that assistance to the struck employer to a halt and not to interference with the carrier's operations for other employers; that "the picketing was designed to accomplish no more than picketing outside the entrance [to the struck plant] might have accomplished;" and that "there was no other place where the union could have brought home to the . . . workers servicing [the struck employer] its dispute with [the struck employer]," (*Carrier*, 376 U.S. at 499-500).

In short, the reasoning of the opinion below tends to undermine the achievements of a decade. Unless the decision below is reversed, it is certain to stimulate a new cycle of litigation before the Board and the lower courts over issues which this Court justifiably regarded as settled even when it decided *Carrier*.

2. The Board's Memorandum disagrees with the Court of Appeals' characterization of the importance of the case, and asserts that "a reading of its opinion as a whole indicates that the decision rests on the particular facts, as does the Board's decision (see n. 2, *supra*)." (Mem. p. 4, n. 5.) While this attempt to limit the decision below to its facts jibes with Board counsel's litigation strategy (see Motion, p. IV, *supra*), no such narrowing construction is permissible. Of course, it is simply misleading to suggest that since the Board had based its decision dismissing the complaint on a careful evaluation of the circumstances, the decision below reaching the opposite conclusion was likewise grounded on the particular facts of the case. If counsel's argument is intended to imply that the Board's decision was insignificant, it is contrary to the Board's own assessment in its report to Congress. See Thirty-Fourth Annual Report of

the National Labor Relations Board, pp. 22-26, where *Auburndale Freezer* is one of eight "Decision Highlights" of fiscal year 1969, selected for special mention as "establishing basic principles." The impact and importance of the principle established by the Court of Appeals is even greater, since its reasoning is more generalized and applies to *any* picketing at an independent warehouse where the goods of a primary employer are stored.

The Court of Appeals' holding cannot be narrowed by attributing to its majority the reasoning of the dissenting members of the Board (Mem. p. 3). For it is clear that the portions of the court's opinion, which the Memorandum selectively quotes (Pet. App. pp. 3-4, 5), constitute the exposition of the case rather than the holding, which is contained in the passages quoted at the outset of our Argument, p. 2-3, *supra*.[2]

Indeed, a basic deficiency of the Court of Appeals' reasoning is its failure to deal with the facts on which the Board had based its decision or even to discuss the critical conclusion which the Board derived from those facts:

> "These facts indicate that the concentrate, while stored at the Auburndale warehouse, is, for all practical purposes, under the control of Cypress, that the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, that there is substantial contact between Cypress, its employees, and the Auburndale warehouse and, that the storage of the concentrate at the warehouse, which practice has been continuous since 1956, *constitutes an integral part of the Cypress production process.* To the extent that the Auburndale warehouse is a part of the Cypress operation, we conclude that the warehouse constitutes a common situs." (Pet. App. p. 22, emphasis added.)

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[2] While we are in complete disagreement with both the reasoning and the result of the opinion below, we acknowledge that the lower court makes quite clear what it is deciding. The statement of the case, the statement of the issue, the quotations of the statute, the majority's reasoning, and the statement of the result follow in clear and unmistakable progression.

Finally it should be noted that no narrower rule of law than that so plainly announced would have achieved the result which the court below deemed essential—to protect "public warehouse operator[s] and other employers who use [their] facilities" from "picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse," (Pet. App. pp. 5-6). And the lower court's rationale undoubtedly achieves such broad protection for warehousemen, and concomitantly such direct inhibition of primary strike activity by employees whose employers choose to store their goods temporarily on another's property.

It is thus a further ground for review by this Court that the Court of Appeals has substituted its own economic predilections for the adjustment of interests adopted by Congress which made it "clear that secondary employers are not necessarily protected against picketing aimed directly at their employees," *Jacksonville Terminal Co.*, 394 U.S. at 389, following *General Electric* and *Carrier*.

In sum, it is inescapable that the decision below rests on the theory that there is a "real" or "true situs" of a dispute and that picketing away from that situs is necessarily "secondary" and forbidden by § 8(b)(4)(B). It is therefore a throwback to the approach to § 8(b)(4) which has long been thoroughly discredited. As was observed in *Jacksonville Terminal*, "the common law of labor relations has created no concept more elusive than that of 'secondary' conduct" 394 U.S. at 386; consequently, judges were able to decide individual cases by "intermixing metaphysics with their notions of social and economic policy" (*id.*). It is therefore particularly essential that the lower courts be closely confined to the methods of analysis which this Court has determined, after mature deliberation, best serve the balance struck by Congress. This Court's decisions, beginning with *General Electric*, direct the lower courts and the Board, in determining the legality of appeals addressed directly to a secondary's employees, to focus their inquiry

on the "nature of the work performed." Since the decision below fails to heed this teachings and instead repeats the errors of the past in a critical and much litigated area of labor relations, it should not be permitted to stand.

CONCLUSION

For the above-stated reasons, as well as those stated in the Petition, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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May, 1971